

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From January 1, 1953
Through March 31, 1953

VOLUME 70

SI GARRET, Attorney General

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QUARTERLY REPORT
of the
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January 1, 1953
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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1953, through March 31, 1953, as published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code. I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,
Attorney General.

OPINIONS

January 15, 1953

Hon. W. J. Terry

State Superintendent of Education

Montgomery 4, Alabama

Colleges and Universities—Tuskegee Institute—Appropriations—
Bonds.

The Treasurer of Tuskegee Institute is not required by law to give a \$25,000.00 surety bond, payable to State of Alabama, in connection with appropriations made by Act No. 493, General and Local Acts 1951, page 873, and Act No. 710, General and Local Acts 1951, page 1249.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of November 26, 1952, is as follows:

"Please read the attached letter from Mr. L. H. Foster, Jr., Business Manager and Treasurer of Tuskegee Institute and give me your opinion on the following questions:

"1. Does the law presently require a \$25,000 bond from Tuskegee Institute in favor of the State of Alabama in connection with the appropriations made in Acts No. 493 and 710, approved August 22, 1951, and September 5, 1951, respectively?

"2. If a bond is required, will the proposal of Mr. Foster and his insurance broker meet the legal requirements of the current appropriations made in the acts referred to above?

"Please note the following references:

"Act No. 87, approved June 12, 1945.

Act No. 223, approved July 29, 1947.

Act No. 636, approved October 9, 1947.

Act No. 489, approved August 30, 1949.

Act No. 553, approved September 7, 1949.

Act No. 493, approved August 22, 1951.

Act No. 710, approved September 5, 1951."

Under Act No. 245, General Acts 1943, page 202, there was appropriated out of the General Fund of the State by the Legislature the sum of \$100,000 annually to Tuskegee Institute. The appropriation made was payable as of October 1, 1943, and for each of the fiscal years ending September 30, 1944, and September 30, 1945. The appropriation was to be used principally for the purpose of establishing and maintaining a graduate school in agriculture and a graduate school in home economics. The appropriation was payable to the Treasurer of Tuskegee Institute, and a \$25,000 surety bond was required from him, payable to the State of Alabama, to insure the safe-keeping of the appropriation made by the act. The bond was to be approved by the Secretary of State and filed in his office. The premium on the bond was payable by the State out of the General Fund.

Act No. 87, General Acts 1945, page 85, continued the \$100,000 appropriation, and provided an additional \$50,000 annually to Tuskegee Institute for establishing and maintaining a graduate school in veterinary medicine. These appropriations were payable October 1, 1945, and for each of the fiscal years ending September 30, 1946, and September 30, 1947. The provisions with reference to the surety bond were the same as those provided by said Act No. 245.

Act No. 223, General Acts 1947, page 90, appropriated the sum of \$150,000 to Tuskegee Institute for the fiscal years ending September 30, 1948, and September 30, 1949, but made no provision for a surety bond. Likewise, no provision for a surety bond was made in Act No. 636, General Acts 1947, page 486, appropriating \$64,900 to Tuskegee Institute.

By Act No. 553, General and Local Acts 1949, page 861, and by Act No. 493, General and Local Acts 1951, page 873, the appropriations of \$225,000 for the fiscal years ending September 30, 1950-51-52-53, were made to the State Superintendent of Education. He is authorized by said Acts Nos. 553 and 493, at his option, to negotiate contracts with Tuskegee Institute for undergraduate and graduate instruction of Alabama residents in engineering, veterinary medicine, and for graduate instruction in home economics and agriculture.

By Act No. 710, General and Local Acts 1951, page 1249, \$75,000 was appropriated to the State Superintendent of Education to be expended in the same manner as provided in said Acts Nos. 553 and 493, with the exception that he was authorized to also contract with Tuskegee Institute for instruction of Alabama residents in medical technology.

Acts Nos. 553, 493, and 710 make no provision for a surety bond, and the contracts and the expenditure of the appropriations are to be in accordance with the rules and regulations promulgated by the State Board of Education.

It is to be noted that the appropriations to Tuskegee Institute were first made direct to it with surety bond being required. They were next

made direct to Tuskegee Institute without requiring a surety bond, and finally made for the benefit of Tuskegee Institute and other purposes direct to the State Superintendent of Education with no surety bond being required.

It is my opinion, therefore, that the law does not now require a \$25,000 surety bond from Tuskegee Institute, payable to the State of Alabama, in connection with the appropriations made by said Acts Nos. 493 and 710.

If follows, therefore, that it is not necessary to answer your second question.

Very truly yours,

SI GARRETT

Attorney General

January 15, 1953

Hon. Frank Bunkley

Tax Collector

Mobile County

Mobile, Alabama

Ad Valorem Taxes—Taxation—Tax Collectors—Municipalities—
Refunds.

1. When revenue comes into the hands of a tax collector, even though under protest, the collector is bound, under the law, to distribute the same in the manner provided by law.
2. Quarterly Report of Attorney General, Vol. 13, page 82, overruled in part.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of December 29, 1952, is as follows:

"I respectfully request that you give me your official opinion on the question presented by the following facts:

"A few weeks ago the Tax Assessor of Mobile County made certain escape assessments of ad valorem taxes upon real property located in Mobile County, Alabama. Under these certain assessments made by him, I have collected approximately \$18,000.00 in taxes. One of the persons against whom an escape assessment was made appealed his assessment to the Probate Judge of Mobile County and the Probate Judge determined that the escape assessment made by the Tax Assessor was an illegal assessment and that the taxes paid had been paid erroneously.

"Subsequently I have been advised by the Examiners of the Department of Examiners of Public Accounts of the State of Alabama that the taxes collected by me under these escape assessments should be disbursed by me as provided by law. However, I have been notified by several of these persons who paid taxes under the escape assessments in question that petitions for refund of the taxes paid by them would be filed and that unless refund of the taxes was made by me that legal action would be taken against me to recover the same.

"For your more complete information, I am attaching hereto a photostatic copy of one of the demands for refund which I have received.

"Please advise me whether I should disburse the taxes collected by me under the escape assessments in question to the proper authorities entitled to receive the same or whether I should make refunds of the taxes so collected by me to the persons who paid such taxes."

It is my opinion that you have no authority to do anything other than to disburse the monies in question the same as you disburse all other monies collected by you as tax collector. I find no statute whereby you are given authority to pass on a petition for refund of taxes collected by you.

When revenue comes into the hands of a tax collector, even though under protest, the collector is bound, under the law, to distribute the same in the manner provided by law. Quarterly Report of Attorney General, Vol. 13, page 82.

In view of the provisions contained in Title 37, Sections 722, 729, and 730, Code of Alabama 1940, so much of the opinion of this office reported in Quarterly Report of Attorney General, Vol. 13, page 82, dealing with taxes collected by municipalities is hereby overruled. See also Title 51, Sections 332 and 333, Code of Alabama 1940.

Yours very truly,

SI GARRETT

Attorney General

January 15, 1953

Hon. T. J. Land, Sr.

Chairman

Walker County Board of Revenue

Jasper, Alabama

Officers and Offices—County Health Officer—Walker County.

The County Health Officer of Walker County, who is receiving a salary of \$4800.00 annually under the provisions of Act No. 290, Local Acts 1947, page 220, cannot be paid \$100.00 per month by the county to attend inmates of the jail and nursing home, Act No. 593, Local Acts 1915, page 412, creating the office of County Health Officer of Walker County, specifically requiring that he devote his entire time to the duties of his office.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of December 3, 1952, is as follows:

“By a local act approved September 17, 1915, Act No. 593, there was created for Walker County the office of full time Health Officer, which act provided for the election of such officer and prescribed the term of office, duties, salary and expenses of such officer. That act was amended with reference to an increase in salary by an act, No. 68, approved February 14, 1919. Said act was further amended on August 12, 1947, Act No. 290, by increasing the salary of the Health Officer of Walker County, Alabama.

“The original act provides that the Health Officer of Walker County shall devote his entire time to his duties of office during his term of office. And it further provides that the duties of the Health Officer of Walker County shall be those prescribed in the Code of Alabama for all county health officers.

“A county physician has heretofore been employed by the Walker County Board of Revenue, and it is his duty to look after the prisoners at the Walker County Jail and the patients at the Nursing Home. For these services he has been paid the sum of \$100.00 per month. Recently the county physician died, and the Walker County Board of Health recommended to the Walker County Board of Revenue that the duties heretofore performed by the county physician be given to the County

Health Officer, and that he be compensated by an additional sum of \$100.00 per month.

"Your official opinion is respectfully requested as to whether the Walker County Board of Revenue can pay to the County Health Officer the sum of \$100.00 per month to perform the duties heretofore performed by the county physician. There is a shortage of doctors in Walker County, and if the County can legally employ the County Health Officer to serve as county physician, it would like to do so. But it is felt that your opinion should be given before taking this step."

Under Section 703, Paragraph (g) of the Code of Alabama of 1907, the county board of health elected the physician to attend the inmates of the county poorhouse and jail. The section also provided that the county health officer could fill that position. The county board of health, likewise under Section 703, Paragraph (e), elected a county health officer, removable at pleasure. There was no provision that he should devote his full time to his position.

By Act No. 658, General Acts 1919, page 909, said Section 703 was amended. The county board of health, under the amendment, continued to elect the county health officer, subject, however, to the approval of the State Committee of Public Health, and it was provided that the county health officer "shall devote all of his time to the duties of his office.." By this amendment the county boards of health no longer elected the physician to attend the inmates of the poorhouse and jail and the county health officer no longer had statutory authority to fill that position. By Section 7 of said act the office of part time county health officer was abolished.

By Act No. 678, General Acts 1915, page 737, the Legislature authorized the courts of county commissioners or boards of revenue in counties of over 150,000 population to elect a physician or physicians to attend the inmates of the poorhouses and jails. This act was revised by the Code Committee in 1923 so as to make it apply to all counties in the state, added the duty to attend inmates of county convict camps, and it became Section 4823, Code of Alabama 1923.

The present law is found in Title 45, Sections 140 and 141, Code of Alabama 1940, and is as follows:

"The courts of county commissioners or boards of revenue in the various counties in this state may elect a physician or as many physicians as in their discretion may be necessary to attend the inmates of the county poorhouses and jails in such counties, and county convict camps.

"Such courts shall fix and determine the term or terms of such physicians, which term or terms of office shall not be for a longer period

than two years, and may be removed at the will of such courts, and such courts shall fix and determine the amount of compensation, which shall be paid to such physician or physicians and shall determine what duties such physician shall perform."

The very first paragraph of Act No. 593, Local Acts 1915, page 412, is "That the office of full-time county health officer, for Walker County, Alabama, be and the same is hereby created." (Emphasis supplied.) The act then provides that he is to be elected by the county board of health for a three-year term, subject to removal, however, at any time by the board. His duties are the same as those of county health officers under the general law, plus such other duties as may be required of him by the county board of health.

It is specifically provided in said Act No. 593:

"The health officer of Walker County shall devote his entire time to the duties of his office during his term of office." (Emphasis supplied.)

His salary is now fixed at \$4800.00 a year payable in equal monthly installments out of the general funds of Walker County, Alabama. Act No. 290, Local Acts 1947, page 220.

This legislative history indicates, and it is my opinion the Legislature intended that the County Health Officer of Walker County should devote his entire time to the duties of that office unhampered by any other employment. *Miller v. Valley*, 122 Miss. 521, 84 So. 466; 30 C. J. S., Entire, Page 263.

It follows, therefore, that your question must be answered in the negative.

Yours very truly,

SI GARRETT

Attorney General

January 15, 1953

Hon. W. J. Terry

Superintendent of Education

Department of Education

C A P I T O L

State Board of Education—Schools—Funds.

1. There does not exist any such agency as the Textbook Purchasing Board, consequently there is no sound reason nor legislative sanction for the maintenance by the State Department of Education of a fund known as the Textbook Purchasing Board Fund.

2. All revenue accruing to, and all expenditures made by, the State Board of Education in connection with the administering of the statutes providing for the furnishing and distributing of free textbooks to certain of the pupils in the public schools of the State should accrue to or be made from the Free Textbook Fund, as authorized and established by law.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 18, 1952, is as follows:

"Sections 414 and 415, Title 52, Code of Alabama 1940 were repealed in 1945 Section 15 of Act No. 412, approved July 7, 1945, mentions the Textbook Purchasing Board Fund. Funds have accrued to the Textbook Purchasing Board Fund and been deposited in the State Treasury to the credit of this fund. The Legislature also makes an appropriation for free textbooks.

"I should like to ask the following questions:

"1. Is the Textbook Purchasing Board Fund a legal fund?

"2. What revenue is the Textbook Purchasing Board Fund entitled to received?

3. How may this be expended?"

In answer to your first inquiry, I would advise that I find no provision of law establishing or making provision for a fund known or designated

as the Textbook Purchasing Board Fund. As pointed out in your request for opinion, Sections 414 and 415 of Title 52, Code of Alabama 1940, were repealed by Act No. 412, General Acts 1945, page 647. The same is likewise true of Section 19 and Sections 409 - 431 inclusive of Title 52, Code of Alabama 1940, as well as Sections 432 and 433 of Title 52, *supra*, as amended by Act No. 313, General Acts 1943, page 300. However, I do not find in Act No. 412, *supra*, any reference to the Textbook Purchasing Board Fund. Nor do I find in any of the repealed statutes any reference to the Textbook Purchasing Board Fund. I am, therefore, of the opinion that there has never existed by reason of law any fund required to be known and designated as the Textbook Purchasing Board Fund.

I do find that prior to the effective date of Act No. 412, *supra* (October 1, 1945), there did exist a Textbook Purchasing Board with certain designated duties in connection with the procurement of the free textbooks purchased and furnished by the State to certain of the students in the public schools of the State. In the performance of such duties certain funds did accrue to the Textbook Purchasing Board in the form of cash deposit forfeitures, rebates, etc., by the persons, firms or corporations furnishing such textbooks to the State. However, I am of the opinion that all of such revenues so accruing should have been deposited to the credit of the Free Textbook Fund, consisting of the legislative appropriation for such purpose, rather than to the credit of the Textbook Purchasing Board Fund.

From the above, you will note that I am of the opinion that even prior to the effective date of Act No. 412, *supra*, when there was in existence a Textbook Purchasing Board, there was no legitimate reason nor legislative sanction for a Textbook Purchasing Board Fund.

As I interpret the provisions of Act No. 412, *supra*, such Act has the effect of completely abolishing the Textbook Purchasing Board and vests all of the power and authority formerly held and exercised by such Board in the State Board of Education. There no longer exists at law any such instrumentality as the Textbook Purchasing Board. You will further note that Act No. 412, *supra*, on at least two occasions, makes specific reference to the Free Textbooks Fund, providing that in the event of forfeited cash deposits by the persons, firms or corporations furnishing such textbooks, such deposits shall accrue to the Free Textbooks Fund. It is likewise significant that all legislative appropriations for such purposes are also designated as being for the purchase of free textbooks, and, it is reasonable to assume, that such appropriations are credited to a fund or account known as the Free Textbooks Fund, and that all revenue accruing or expenditures made in connection with the administering of the statutes pertaining to the furnishing and distribution of free textbooks should be made from the Free Textbooks Fund.

I am, therefore, of the opinion that, from a legal standpoint, there does not exist any such agency as the Textbook Purchasing Board, nor is there

any sound reason or legislative requirement that there be a Textbook Purchasing Board Fund, and that same should be discontinued and the funds now deposited to the credit of such fund should be credited to the Free Textbooks Fund.

Having answered your first inquiry in this manner, it becomes unnecessary to give answer to your latter two inquiries. However, I feel it well to point out that the purposes for which the funds accruing to the Free Textbooks Fund may be expended are specifically set out in Section 15, Act No. 412, *supra*, in the order of priority by which such authorized expenditures may be made.

Very truly yours,

SI GARRETT

Attorney General

January 20, 1953

Hon. T. C. Almon

Judge of Probate

Morgan County

Decatur, Alabama

Licenses—Taxation—Money Lenders—Loans.

An automobile finance company, which engages in the business of discounting or buying conditional sales contracts or mortgages on personal property, and also engages in the business of making personal loans to individuals, must pay a license pursuant to Title 51, Section 495(1) and Section 495(2), Code of Alabama 1940.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of December 2, 1952, is as follows:

“Atlas Finance Company, Inc., doing business under the name Atlas Auto Finance Company, is preparing to open an office in Decatur, Mor-

gan County, Alabama, in the near future. The representatives of the company have inquired as to what, if any, State and County license will be payable in Morgan County.

"The company is engaged exclusively in automobile financing, and states that no loans will be made except loans secured by mortgages or conditional sales contracts on automobiles. The principal business of the company is financing the purchase of automobiles, but a part of the business promotion activity of the company includes the making of loans to individuals on automobiles already owned by the individuals. In each such case, a mortgage is taken on an automobile.

"The company operates several offices in Alabama, the principal office being in Etowah County, where the company pays the maximum license as provided in Subsection 1 of Section 495 of Title 51 of the Code of Alabama of 1940.

"Since each of the transactions includes either buying conditional sales contracts or taking mortgages on personal property, the question arises as to whether such company is also required to pay the license under Subdivision 2 of Section 495, supra, under the theory that the loans to individuals on automobiles already owned by them might be classified as a different business sought to be licensed under Subdivision 2.

"Your opinion on this matter is respectfully requested. The company anticipates that it will be ready to begin business within two or three weeks so an early reply is requested."

The facts of your request indicate that the Atlas Finance Company actually engages both in the business of discounting or buying conditional sales contracts or mortgages on personal property within the meaning of Title 51, Section 495(1), Code of Alabama 1940, and also in the business of making personal loans to individuals within the meaning of Section 495(2), supra. At the outset, I observe that this opinion will not deal with any license which may be due the State Department of Revenue, nor any license due to the Bureau of Loans under Act No. 787, General Acts 1951, page 1385, but will be restricted to an interpretation of Section 495, supra.

The facts of your request indicate that Atlas is within the holding of this office in Quarterly Report of Attorney General, Vol. 30, page 93. There, where a company engaged in the activities described in Section 495(1), supra, as well as those described in Section 495(2), supra, it was held that for purposes of taxation the business or occupation of discounting conditional sales contract, etc., and the business of lending money on salaries or making industrial or personal loans are separate and distinct businesses or occupations, for each of which a license is imposed.

In addition, Title 51, Section 838, Code of Alabama 1940, is in point. This section provides that if a person, firm, or corporation engages in more than one business which is subject to taxation, such person or corporation must pay the tax provided by law on each branch of the business.

The statutory provisions cited above and the opinion of this office, *supra*, indicates that Atlas must pay a license pursuant to Section 495(1), *supra*, which apparently Atlas is already paying. In addition, Atlas must pay an annual license of \$100.00 for each county in which it engages in business pursuant to Section 495(2), *supra*. For a discussion of the measure of these licenses, see *Leath v. Wilson*, 238 Ala. 577, 192 So. 417.

Yours very truly,

SI GARRETT

Attorney General

January 26, 1953

Hon. Coma Garrett, Jr.

Judge of Probate

Clarke County

Grove Hill, Alabama

Municipalities—Counties—Hospitals—Appropriations.

1. A city, or town, or county may either jointly or severally establish, operate, and maintain a public hospital.

2. When a city or town undertakes to establish, operate, and maintain a public hospital, the county governing body may appropriate county funds to the municipality for the purpose of aiding in construction of the hospital only and place the authority to manage, operate, control, and maintain the hospital in the municipality.

Opinion by Assistant Attorney General Sykes.

Dear Judge Garrett:

I have a request for an opinion dated January 19, 1953, submitted in your behalf by Hon. John E. Adams, County Attorney of Clarke County, which is as follows:

"Following the conversation which you and I had on the telephone the other day, Clarke County and the City of Jackson did work out an agreement under which they propose to unite, under authority of Section 189 of Title 22 of the Code of Alabama of 1940 in the establishment and erection of a hospital in the City of Jackson. As county attorney, I prepared a resolution and a proposed agreement between the City and the County; and independently of the resolution and agreement, we made an escrow agreement with the Jackson Bank & Trust Company under which the County appropriation is to be held in escrow to assure compliance by the City with the terms of the agreement.

"On Friday afternoon the Commissioners met and adopted the resolution, under which the County appropriates \$15,000.00 to aid in the construction of the hospital, and authorized the execution of the agreement referred to in the resolution.

"Judge Garrett says that he feels that he should have, on a matter of this magnitude, the protection of an official opinion from the Attorney General before disbursing the \$15,000 authorized in the resolution. Hence, at his request and in his behalf I am submitting herewith an exact copy of the resolution, an exact copy of the contract which the County proposes to execute with the City of Jackson, and an exact copy of the escrow agreement (which really is independent of the resolution and contract, but is submitted in order that you may have the entire picture before you), with this request, which is to be treated in all respects as if submitted to the Attorney General by Judge Garrett himself in person, that you examine these documents and advise Judge Garrett whether he can legally issue, execute and deliver a county warrant for \$15,000 to the City of Jackson, the proceeds to be held under the escrow agreement in the Jackson Bank & Trust Company in conformity with the agreement enclosed."

It is unnecessary to set out at length the resolution of the county governing body of Clarke County. The resolution recognizes the need for a hospital in the city of Jackson, and recites the various sources from which contributions will be made to the city for the construction of the hospital. The resolution further recites that the city of Jackson has asked the county governing body of Clarke County to appropriate county funds to be held in trust by the city and that such funds will be used solely for the erection of a hospital. The contract or agreement between the city of Jackson and Clarke County is incorporated in the resolution. The resolution further recites the need for a hospital in Clarke County, and the decision of the county governing body to limit the County's participation to the extent shown by the agreement or contract. The resolution further limits the participation of the county to the contribution of a fixed sum to be paid to the municipality and to be used in the erection of the hospital. The members of the county governing body are empowered by the resolution and directed to execute the contract or agreement with the city.

An appropriation is then made in the resolution out of the general funds of the county to be used to aid in the construction of the hospital, and directions are given for a county warrant to be drawn, executed, and delivered to the city of Jackson to be disbursed according to the terms of the contract or agreement.

The agreement referred to in the inquiry and in the resolution is made between the city of Jackson and Clarke County. The city promises to undertake to erect and equip a hospital in Jackson, Alabama, and to spend a certain amount of money in so erecting and equipping such hospital. The county agrees to make a specific appropriation to the city to be held in trust for the purpose of erecting the hospital. The county's appropriation, by the terms of the agreement, will revert to the county if work on the hospital has not commenced by the first day of January, 1954. The city undertakes all responsibility for constructing the hospital, maintaining and managing it. Title to the hospital is said to be in the city of Jackson, and the county's responsibility toward the hospital ceases after the payment of the appropriation. Residents of the county, as well as the city, are to be admitted to the hospital without discrimination.

The separate escrow agreement is addressed to a bank in Jackson, Alabama, directing the bank to deliver the warrant representing the county's appropriation to the city when the city begins construction of the hospital. This escrow agreement further provides that the money represented by the warrant shall be returned to Clark County if construction is not begun on or before the first day of January, 1954.

In my opinion, the county has full authority to make the appropriation referred to in your inquiry. It has been held that a city or town may establish and maintain a public hospital. *Hamilton v. City of Anniston*, 248 Ala. 396, 27 So. 2d. 857; Title 37, Sections 469, 495, Code of Alabama 1940; Title 22, Sections 189, 190, Code of Alabama 1940. This office has also held that a county may establish and maintain a public hospital. Quarterly Report of Attorney General, Vol. 55, page 160; Title 12, Section 185, Code of Alabama 1940.

Not only may a city, town, or county establish and maintain a hospital, but also the project may be undertaken jointly. Quarterly Report of Attorney General, Vol. 27, page 18; Quarterly Report of Attorney General, Vol. 39, page 17.

In an opinion of this office under date of August 29, 1947, found in Quarterly Report of Attorney General, Vol. 48, page 151, this office specifically held that under the provisions of Section 189, *supra*, a county governing body was authorized to contribute to the maintenance of a public city hospital built and managed by a municipality within the county. The same statute (Section 189, *supra*) which authorizes maintenance also authorizes the establishment or construction of a hospital.

I am, therefore, of the opinion that both the city and county are authorized to either jointly or severally appropriate their funds for the construction of a hospital, and, furthermore, that a county is authorized to contribute its funds for the construction of a hospital to be owned, operated, and maintained by a city. The county, in my opinion, in its discretion, may limit its participation to an appropriation of a large sum for the construction only, and may, by an agreement with the city, place the management, control, and operation of the hospital and the maintenance thereof in the city.

Very truly yours,

SI GARRETT

Attorney General

January 28, 1953

Hon. W. J. Terry

State Superintendent of Education

C A P I T O L

State Board of Education—Appropriations—Schools—Funds

1. Funds received by the State Crippled Children's Service in the form of gifts, donations, bequests, etc., may be deposited to the credit of the Local Crippled Children's Service Trust Fund established under the provisions of Title 49, Section 102, Code of Alabama 1940, as amended by Act No. 186, General and Local Acts 1949, page 218.

2. When expenditures are made from State funds under the Federal matching program, with subsequent reimbursements being received during the next ensuing fiscal year, such reimbursements when received should be deposited to the credit of the Alabama Special Educational Trust Fund rather than to the funds appropriated for the current year for physical restoration of crippled children or vocational rehabilitation, as they represent a recovery of a prior year's appropriations, and if retained by the State Crippled Children's Service or vocational rehabilitation authorities, would inflate their budgets for the current year.

3. Federal audit exceptions arising in the course of the joint State-Federal programs in connection with the physical restoration of crippled children or vocational rehabilitation may be restored by payment from State funds currently available if the original expenditures were for purposes or items authorized as State expenditures.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 27, 1952, is as follows:

"Your official opinion is respectfully requested on the following questions:

"1. Under provisions of Title 49, Section 101, Code of Alabama, monies appropriated by the State Legislature for services to crippled children are deposited with the State Treasurer in an account designated as 'Physical Restoration of Crippled Children, Alabama Special Educational Trust Fund'. For bookkeeping purposes the accountant for the Crippled Children's Services divides this fund into State Matching Fund and State Non-Matching Fund each year. The State Matching Fund is that portion of the state appropriation used to match federal funds. The State Non-Matching Fund is the difference between the State Matching Fund and the total State appropriation for the physical restoration of crippled children.

"Title 49, Section 102 of the Code of Alabama creates 'The Local Crippled Children Service Trust Fund'. Monies accruing to the Crippled Children's Service through gifts and donations by individuals and organizations make up the Trust Fund. All monies donated are deposited with the State Treasurer.

"If the State Crippled Children's Service makes expenditures from Non-Matching Funds for the physical restoration of crippled children and later the National Foundation for Infantile Paralysis, the Alabama Society for Crippled Children and Adults, or other organizations or individuals make funds available to the Crippled Children's Service in the amount of the expenditure from the State fund, can the State Crippled Children's Service deposit these funds with the State Treasurer to the account of the 'Local Crippled Children's Service Trust Fund'?

"2. Under provisions of Title 49, Sections 101 and 102, and Title 52, Section 392, Code of Alabama, funds appropriated by the State Legislature for Crippled Children's Service are deposited with the Treasurer in an account designated as 'Physical Restoration of Crippled Children,

Alabama Educational Trust Fund'. Under provisions of Title 52, Sections 391-398, Code of Alabama, funds appropriated by the State Legislature for rehabilitation purposes are designated as 'State Civilian Rehabilitation Service, Alabama Special Educational Trust Fund'. Under Title 52, Sections 392 and 390, the State Treasurer is authorized to accept federal funds for crippled children and vocational rehabilitation expenditures. During a given period expenditures are made from state funds for purposes that may be paid from either state or federal funds. The reason for making the expenditures from the state funds is due to the fact that federal funds are unavailable at the time. At the time the expenditure is made there is no assurance of future reimbursement from federal funds. Later federal funds may become available to the extent that all or part of the items paid from state funds can be charged against the federal fund. In the meantime a state fiscal year has ended. "When the expenditures are made from Crippled Children and Rehabilitation Services state funds during one State fiscal year and federal reimbursement for these expenditures is received during the subsequent state year, may it be used during the year in which it is received for Crippled Children and Rehabilitation purposes?

"3. Under federal regulations issued by the Office of Vocational Rehabilitation and the Children's Bureau of the Federal Security Agency, and under provisions of the Approved State Plans governing expenditures of federal funds for Vocational Rehabilitation and Crippled Children's Services, federal funds may be expended for janitor service, rent, and for direct services to the individual as well as for other purposes. Exception to payment of items from federal funds may be made by the federal auditor, due to oversight of some minor detail or a lack of clarification of the regulations. Example: Federal auditor makes exception of expenditure of federal funds for janitor service when paid to the Department of Corrections and Institutions of the State of Alabama, and for office rent when paid to a public agency. Such exceptions are made in a fiscal year subsequent to the one in which the expenditure is made. Of necessity, the exception is charged to the current state fund available.

"Can an audit exception on expenditures from Federal funds made during one fiscal year, such as for janitor service, office rent and direct services to handicapped individuals, be adjusted by payment from Crippled Children and Rehabilitation Services State funds during the next fiscal year, when the expenditures were made for items for which State funds can legally be spent?

"Your prompt attention to these questions will be appreciated."

I have reviewed the provisions of Title 49, Sections 101 and 102, Code of Alabama 1940, as amended by Act No. 186, General and Local Acts 1949, page 218, and I feel there is ample authority for the establishing of each

of the funds mentioned in your inquiry. As I understand it, a portion of the first designated fund, i.e. Physical Restoration of Crippled Children, Alabama Special Educational Trust Fund, is reserved for matching purposes within the framework and provisions of the Federal Social Security Act, while the residue is utilized for other authorized State expenditures for the purposes mentioned in Section 101, as amended, *supra*. Furthermore, under the authority of Section 102, as amended, *supra*, the State Board of Education is authorized to accept, administer, and expend such donations, gifts, and bequests as it may receive for the further development of the State's program of physical restoration of crippled children or children having any congenital or acquired malformations or disabilities. These donations, gifts, bequests, etc., I understand, are deposited to the credit of an account known and designated as the Local Crippled Children's Service Trust Fund.

In your request you advise that on occasion the State Crippled Children's Service receives from certain organizations or individuals donations or gifts in like amount as that previously expended by the State in the restoration of crippled children, which expenses were originally paid from the legislative appropriation therefor not used for Federal matching purposes and in conformity with the provisions and purposes of Section 101, as amended, *supra*. You inquire as to whether such donations, gifts, etc., when received may be credited to the Local Crippled Children's Service Trust Fund.

I am of the opinion that such donations, gifts, etc., may be so credited and used in the manner and for the purposes stated in Section 102, as amended, *supra*. The fact that such gifts, donations, etc., are in like amount or were presented the State by reason of expenditures previously made from the appropriation for restoration of crippled children would not change the nature thereof, and I feel that they would still constitute gifts, donations, or bequests and could be credited to the Local Crippled Children's Service Trust Fund. The above conclusion is based upon my understanding of the facts stated that such expenditures and the receipt of such donations, gifts, etc., are no part of the Federal matching programs engaged in by the State and Federal government under the Federal Social Security Act.

Your second inquiry is answered in the negative. As I understand, the State appropriations for both the physical restoration of crippled children and vocational rehabilitation purposes are made from the Alabama Special Educational Trust Fund. I understand that a portion of each of such appropriations is used in matching Federal monies likewise appropriated to the various states for the above purposes. Under such programs, you advise, the Federal government reimburses the State, in whole or in part, for certain expenditures made by the State in the conduct of the programs for the physical restoration of crippled children or the vocational rehabilitation program, if at the time of such expenditure there was not

available to the State sufficient Federal money to permit the authorized Federal participation in the specific program. At times such reimbursements are received from the Federal government after the State has entered a new fiscal year, and you inquire as to whether such money when so received should be credited to the current annual appropriations for such programs.

I would advise that it is my opinion that, when such Federal reimbursements are received after the State has entered into a new fiscal year, the reimbursements so received constitute a recovery of a portion of a prior year's appropriation, and should be credited to the Alabama Special Educational Trust Fund, the fund from which the appropriation was originally made, as it constituted a balance due at the close of the prior fiscal period, and, consequently, when received should revert, under the provisions of Title 55, Section 104, Code of Alabama 1940, to the Alabama Special Educational Trust Fund.

Your third inquiry is answered in the affirmative, conditioned, of course, upon the fact, as stated by you, that the original expenditures resulting in the Federal audit exceptions were such as could legally be made from State funds. If such was not the case, then, of course, a monetary liability would result against the official responsible for such expenditures.

It appears to me that the procedure outlined by you is the most practical to be followed in such an instance. I feel that in accepting the Federal benefits the State Board of Education likewise accepts and agrees to the rules, regulations, and conditions attaching thereto. If the money accruing to the State in the form of Federal benefits is not expended in conformity with such rules, regulations, and requirements, then the Federal audit exceptions will result and restitution must be made to the Federal government from State money. If, as you state, the original expenditures were for purposes or items for which State funds might legally be spent, then I feel that the restitution to the Federal government may be made from current appropriations to the State Board of Education for the purposes and programs concerned. This would result in a decrease in money available for the current fiscal year, but this could be taken into account by budgetary adjustment. From a practical standpoint, if such restitution was not made from State funds available, then the Federal agency would only need to withhold such amount from the next allotment of funds to the State of Alabama and the same result would be accomplished. In my opinion, it would be sounder business practice for the State to proceed to make the restitution due from the State funds available than to force the Federal government to effect such withholding.

I might add that the above conclusion is based upon the assumption, as gathered from your request, that such Federal audit exceptions are normally of a minor nature and amount, and the restitution of such amounts would not handicap the current year's programs. If such is not the case, then comprehensive review of such programs should be made by the re-

sponsible authority, the State Board of Education, with a view to eliminating such exceptions or otherwise making provision for same in the annual budget, thereby curtailing the current program.

Very truly yours,

SI GARRETT

Attorney General

January 29, 1953

Hon. Bill Dorrough, Commissioner

Department of Public Welfare

C A P I T O L

Alabama Alcoholic Beverage Control Board—State Department of Public Welfare—Municipalities.

The City of Birmingham has a mandatory duty under Act No. 255, General Acts 1943, page 226, to distribute to the County Department of Public Welfare of Jefferson County that portion of earmarked Alabama liquor profits over and above \$2,200,000 according to the scheme of that statute; and it is irrelevant that in prior years the city distributed to the County Welfare Department a larger proportion of these profits than required by the statute.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of September 5, 1952, is as follows:

"On February 19, 1952, the City Comptroller of the City of Birmingham was requested to make available the Welfare Department's share of A. B. C. profits which were earned during the period July 1, 1951, through September 30, 1951. The city had received the profits February 1, 1952. The State Department of Public Welfare has requested that these monies in the amount of \$48,926.42 be paid to the State Department of Public Welfare. It is our belief that they are due under Act No. 526, General Acts 1951, Page 915.

"The Comptroller of the City of Birmingham takes the position that the city does not owe this money to the Welfare Department. His reasoning is as follows. During the years 1950 through 1951 the City of Birmingham anticipated the distribution of A. B. C. profits and paid to the County Department of Public Welfare \$84,081.85 more than the amount due under Act No. 255 of the 1943 Legislature. For a number of years the City of Birmingham has been anticipating the A. B. C. receipts and paying the County Department of Public Welfare of Birmingham in advance of the city's actual receipt. In 1950 the city advanced what is claimed amounted to \$12,416.22 and in 1951 \$71,665.63—a total of \$84,081.85. For several years prior they were giving the Welfare Department their exact share of the earmarked profits. The City of Birmingham contends that as against the anticipated over-payment of \$84,081.85 for the years 1950 through 1951, there is a credit of \$48,926.33 which represents the receipts of February 1, 1952. By applying the credit of \$48,926.33 the Comptroller reasons that during 1950, 1951, there was advanced to the Welfare Department \$35,155.52 more than the amount of profits earmarked for Public Welfare. It is, therefore, the contention of the Comptroller that it has already over-paid the Department of Public Welfare and does not owe them anything more. "The State Department of Public Welfare believes that the profits in question earned during the period July 1 through September 30, 1951, were not available for appropriation or distribution during the fiscal year 1950 through 1951. If these monies were not available prior to October 1, 1951, it is this Department's contention that they come under the new law which became effective October 1, 1951.

"Will you please give this Department an official opinion stating whether the City of Birmingham now owes the State Department of Public Welfare the A. B. C. profits earned during the period July 1, 1951, through September 30, 1951?"

The City of Birmingham owes the Department of Public Welfare of Jefferson County a portion of the A. B. C. profits paid to that city out of part of profits in excess of \$2,200,000 for the period July 1, 1951, through September 30, 1951, because of provisions of Act No. 255, General Acts 1943, page 226.

These monies were distributed according to your request, on February 1, 1952. Since they were earned during the preceding fiscal year—that is, from October 1, 1950, through September 30, 1951—the amendment to Act No. 255, *supra*, contained in Act No. 526, General and Local Acts 1951, page 915, does not apply. This is because Act No. 526, *supra*, applies to net profits of the Alabama liquor stores "in each fiscal year" after the effective date of that act, which is October 1, 1951.

The scheme in Act No. 255, *supra*, the relevant statute here, is that net profits from the proceeds of Alabama liquor stores in each calendar year "shall be paid out and applied," in the manner set out therein. For our

purposes, it is necessary to consider only the statutory distribution scheme for those profits over and above \$2,200,000 since only a portion of that part of the profits goes to cities and towns earmarked for the county department of public welfare of the county in which the city or town is located. The statutory provision for such excess, or "remainder," is that one-third of the remainder going to cities and towns—or ten percent of the total remainder—"shall be appropriated by such city or town to the Department of Public Welfare of the county in which such city or town is located for general welfare purposes."

It is noteworthy that the mandatory word "shall" is used throughout Act No. 255, *supra*. The contention of the City of Birmingham seems to be that because in previous years the city appropriated a greater portion of these liquor profits to the welfare department than it was required to appropriate under the statute, it may now credit this additional amount and avoid payment to the welfare department out of the instant distribution of liquor profits to the city. But, this contention is without merit. The funds are earmarked by the statute, and their distribution to the county department of public welfare by the city is mandatory. And, there is additional statutory language which further weakens the city's argument, for the act contains the following provision:

"Nothing herein contained, however, shall be construed as a prohibition against appropriation to such Department of Public Welfare of a larger portion or all of the amounts received by any such city or town from such remainder."

For the reasons set out above, when considering the city's mandatory duty to distribute a portion of earmarked liquor profits over and above \$2,200,000 according to a statutory scheme, it is irrelevant that in prior years the city distributed to the county welfare department a larger proportion of these profits than it was required to do by statute.

Though Act No. 526, *supra*, is not involved in this opinion, the rationale of the opinion would apply equally to distribution under that act. Cf. Quarterly Report of Attorney General, Vol. 66, page 11.

Yours very truly,

SI GARRETT

Attorney General

January 29, 1953

Hon. Glenn F. Manning

Solicitor

Twenty-third Judicial Circuit

Huntsville, Alabama

Witnesses—Solicitors—Courts—Attachments—Cost and Fees.

1. There is no provision of law for the payment of witness fees and mileage for persons who appear in response to a subpoena issued by the solicitor as provided in Act No. 818, General and Local Acts 1951, page 1451.

2. If a witness fails to respond to a subpoena issued by a solicitor under the provisions of Act No. 818, supra, the circuit court has no jurisdiction to issue an attachment or conduct contempt proceedings to enforce obedience to the solicitor's subpoena.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 25, 1952, is as follows:

"Act 818, House Bill 996, General Acts of the Legislature 1951, Approved September 11, 1951, provides, in part:

"Section 1. That, in addition to the duties now imposed upon them by law, all circuit solicitors of the State of Alabama shall perform the following extra, new, and additional duties:

"(b) They shall have authority at any time the grand jury is not in session to issue subpoenas to persons to come before them, and they shall have power to administer oaths to said persons and examine them as to any violation of the criminal laws of the State."

"Your opinion is requested with regard to the following questions:

"a. When witnesses are subpoenaed pursuant to Section 1 (b) of the quoted statute, are they entitled to attendance fees and mileage on the same basis as state witnesses subpoenaed for attendance before the grand jury or for the trial of criminal cases? If so, and there is no

case actually pending on the docket at the time, what would be the proper procedure for the clerk of the court to follow in taxing the costs?

"b. May witnesses so subpoenaed be compelled to attend by the process of attachment?

"c. Are witnesses so subpoenaed but failing to attend punishable for Acts 1951, page 1451. As stated in your inquiry, this act imposes new duties. In my opinion, all of your inquiries must be answered in the negative.

The act referred to in your inquiry is Act No. 818, General and Local Acts 1951, page 1451. As stated in your inquiry, this act imposes new duties upon solicitors, and among those duties Section 1(b) authorizes the solicitor, when the grand jury is not in session, to issue subpoenas and to examine persons under oath concerning violations of the criminal laws. It is to be noted that although Section 1(b), *supra*, authorizes the solicitor to issue subpoenas to place a person or witness under oath and to examine that person concerning violations of the law, the statute is silent concerning the payment of witness fees or mileage, and is also silent concerning the manner or mode of enforcing obedience to the process issued by the solicitor.

When the grand jury is in session, it is clear that the solicitor already has authority, and it is his duty, to issue subpoenas for witnesses to appear before the grand jury. Title 30, Section 84, Code of Alabama 1940. And, if a witness so summoned fails to give the testimony desired and the witness has knowledge of the fact, the court may compel the witness to give such testimony by imprisoning the witness for contempt until the testimony is given. *Ex parte Morris*, 252 Ala. 551, 42 So. 2d. 17. The power conferred upon the solicitor by Section 1(b) of Act 818, *supra*, is, therefore, a new power which before the passage of the act the solicitor did not possess. In my opinion, this new power must be confined to the letter of the statute and cannot be extended by implication or construction.

When the solicitor issues a subpoena and a witness appears before him in order to be put under oath and give testimony, I find no provision of law for the payment of witness fees or for mileage. Title 11, Section 103, *et seq.*, Code of Alabama 1940, provides for the payment of witness fees. Section 103, *supra*, provides for witness fees in "criminal cases." Of course, a witness appearing before the solicitor is not a witness in a criminal case as that term is used in Section 103, *supra*. Section 104 of Title 11, *supra*, provides for the payment of witnesses who appear before the grand jury or before a court. Surely, the appearance before the solicitor is not an appearance before the grand jury or before the court. Other statutes providing for the payment of witnesses of their fees and mileage are not applicable to an appearance of a witness in response to a subpoena issued by a solicitor. There being no provision of law authorizing the payment of wit-

ness fees or mileage in such cases, it is my opinion that no fees or mileage are collectible by such witnesses.

Section 1(b) of Act No. 818, *supra*, however, authorizes the solicitor to issue the subpoena and examine the witness under oath, and, in my opinion, it is the duty of the person so summoned to attend and give testimony whether compensation is provided or not. It is well established that it is the duty of a person as a citizen to respond to a duly issued subpoena and to give testimony whether compensation is available or not. 58 Am. Juris., Witnesses, Section 9, page 27; 70 C. J., Witnesses, Section 2, page 34; *Blair v. United States*, 250 U. S. 273, 63 L. Ed. 979; 70 C. J., Witnesses, Section 43, page 55; 58 Am. Juris., Witnesses, Section 18, page 32; 58 Am. Juris. Witnesses, Section 873, page 501, *Ex parte Dement*, 53 Ala. 389. We have similar situations where a witness is required to appear for the State at a preliminary hearing, and, when no indictment is returned, the witness receives no fees for having attended. Quarterly Report of Attorney General, Vol. 22, page 207; *Bilbo v. Drakeford*, 78 Ala. 318.

It is further my opinion that if a person subpoenaed by the solicitor fails to repond to the subpoena and appear, or appearing fails to give testimony, then there is no provision of law for the issuing of attachment or the punishing of the witness for contempt.

The legislature has frequently conferred upon boards, commissions, or officers the power to issue a subpoena to require witnesses to attend hearings. 42 Am. Juris., Public Administrative Law, Section 33, page 326. The Examiners of Public Accounts have such power (Act No. 351, General Acts 1947, page 231, Section 13); the State Board of Medical Examiners (Title 46, Sections 272, 273, 274, Code of Alabama 1940); the Board of Commissioners of the State Bar (Title 46, Sections 35, 37, Code of Alabama 1940); and the Director of the Department of Finance (Title 55, Section 69, Code of Alabama 1940). Each of the boards or commissions referred to above not only has the power to issue subpoenas, but, further, the Legislature has provided for machinery for the enforcement of obedience to the subpoena by providing for an application to the circuit court for a process in the nature of an attachment. If the witness fails to give testimony, the statutes provide for contempt proceedings. In the case of the State Board of Medical Examiners, however, a fine is provided as a penalty rather than commitment for contempt. In all of the illustrations given, however, the Legislature has expressly provided a mode of enforcement of the subpoena power of the board or commission through the courts. The Legislature has not done so in respect to the subpoena power conferred upon the solicitor by Act No. 818, *supra*.

It is my opinion that, even though Act No. 818, *supra*, authorizes the solicitor to issue a subpoena and put a witness under oath and take testimony, such power does not carry with it an implied jurisdiction of the circuit court or any other court to issue an attachment or hold contempt pro-

ceedings if a witness disobeys the subpoena or refuses to give testimony. The power to summon and examine a witness given by statute does not carry with it the power to compel testimony. *Re: Clark*, 65 Conn 17, 31 A. 522, L. R. A. 242; *Noyse v. Byxbee*, 45 Conn. 382.

The Legislature clearly has the power not only to confer upon the solicitor the authority to issue subpoenas and examine witnesses under oath, but also has the power to confer upon the circuit court the jurisdiction to issue an attachment and to conduct contempt proceedings when a witness refuses to answer. See, *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047. In my opinion, until the Legislature confers such power upon the court, there is no power or authority in the court to issue an attachment or punish for contempt when a witness disobeys a subpoena issued by a solicitor under the provisions of Act No. 818, *supra*.

Very truly yours,

SI GARRETT

Attorney General

January 30, 1953

Hon. Grace M. Smith, Register

Franklin County

Russellville, Alabama

Appeals—Registers—Transcripts—Costs and Fees.

1. When oral testimony is taken and transcribed by a court reporter in an equity case and filed in the trial court, the register may, in preparing the transcript for appeal, recopy the testimony on transcript paper and charge the requisite fee therefor.

2. Title 7, Section 769, Code of Alabama 1940, insofar as it requires that, in appeals in equity cases, the transcript must be filed in the appellate court within sixty days from the date of the taking of the appeal is still in full force and effect.

Opinion by Assistant Attorney General Sanders.

Dear Miss Smith:

Your request for an official opinion, bearing date of August 20, 1952, is as follows:

"An Equity case is tried in circuit court and all of the testimony was given orally in the presence of the trial judge in open court under Equity Rules 56 and 57. The official court reporter in the circuit court attended the trial and took down in shorthand all of the testimony in the case. After the final decree was rendered, one of the parties appealed to the Supreme Court. Does the official court reporter file a typewritten transcript of the testimony with me as register and do I re-type the testimony in the transcript that I make as register in the appeal? Does Section 827(1) to 827(6), Code of Ala. 1940, Act No. 866 approved Sept. 12, 1951 as shown by the pocket part of the code apply to transcripts of appeal in equity cases as well as transcripts of appeals from judgments in actions at law in the circuit court? Also see Gen. Acts 1943, page 423. In equity cases, does the official court reporter who takes down the testimony in shorthand make a part of the transcript of appeal when he transcribes the testimony in typewriting or is the register required to retype the testimony in the transcript of appeal, after the same is filed by the court reporter.

"Is Section 769, Title 7, Code of Alabama 1940 still in full force in Alabama in so far as it limits the time for filing the transcripts of appeal in equity cases?

"Please let me have your opinion on these questions."

In answer to your first inquiry, the statute to which you refer, Act No. 886, General and Local Acts 1951, page 1527 (Title 7, Sections 827(1)—827(6), 1951 Cumulative Pocket Part, Code of Alabama 1940), does not apply to appeals from decrees in equity.

This Act is entitled "an Act to amend 'An Act to Abolish Bills of Exception in the Circuit Court and courts of like jurisdiction and all other courts of record having a full time Court Reporter and from which appeals lie directly to the Court of Appeals or the Supreme Court of Alabama in cases at law, and to provide for the evidence to be transcribed and made a part of the record and for assignments of error on the record,' approved July 12, 1943." (Emphasis supplied.) This title clearly shows that the applicability of the Act is restricted to appeals from judgments or rulings in actions at law. Furthermore, the statutory purpose expressed in the title, that is, to abolish bills of exception, also makes it clear that equity appeals

are not within the Act's purview, because bills of exception, even before their abolition in this state, were unknown in equity practice. *Barnett v. Montgomery & Eufaula R. Co.*, 51 Ala. 555.

Act No. 886, *supra*, amended Act No. 461, General Acts 1943, page 423, which was the original statute abolishing bills of exception in the trial of cases at law in certain courts. The 1943 Act provided that the reporter, upon request, was to transcribe the evidence, certify to it and file it with the clerk. This office ruled (Quarterly Report of Attorney General, Vol. 33, page 89) that it was then the duty of the clerk, in making up the transcript on appeal, to copy on transcript paper the reporter's transcription of the evidence and to keep the reporter's original copy on file in the clerk's office, just as had been done previously when a bill of exceptions was filed.

In 1945, however an amendatory act was passed (Act No. 352, General Acts 1945, page 567) by the terms of which the court reporter, when requested to transcribe to evidence, was to do so on transcript paper and also was to make two carbon copies. The original became part of the record on appeal; no recopying by the clerk was therefore necessary.

In the case of *Dewrell v. Kearley*, 250 Ala. 18, 32 So. 2d 812, however, the Supreme Court of Alabama, in construing another section of the 1945 amendment, held it to be inoperative and void; as a result the 1943 Act, *supra*, was considered to be still in effect. Thus it again became the clerk's duty, in preparing the transcript in actions at law, to recopy the reporter's transcription of the evidence. See Quarterly Report of Attorney General, Vol. 51, page 115.

Act No. 886, *supra*, enacted by the 1951 Legislature, again provided that the reporter should make his transcription on transcript paper, and that the original was to be inserted in the transcript by the clerk as part of the record for the appellate court. This particular provision of the new Act has not been interpreted by the courts, but its meaning is clear. As previously stated, however, the history of this legislation shows that its operation is restricted to appeals in law cases; that is to say, the series of statutes has not changed your duty, as Register in Equity, to prepare the transcript on appeals from equity rulings and decrees.

The duty of the register to prepare the transcript for appeal is set out in Title 7, Section 768, and Title 13, Section 215, Code of Alabama 1940. He is entitled to charge a fee for the preparation of such transcripts. Title 7, Section 768, *supra*; Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262. When, under Equity Rule 56, Appendix to Title 7, Code of Alabama 1940, as amended by Act No. 33, General Acts 1943, page 28, oral testimony is taken and transcribed in typewriting by the court reporter and filed in the cause, it becomes a part of the record of the proceedings, and the register may charge a fee for copying such testimony on transcript paper as a part of the transcript on

appeal. This does not, of course, prohibit the parties from agreeing that the transcript may be prepared on transcript paper by the reporter or some other person, provided that the register does not also charge his fee for doing the same task, and provided that the transcript is properly arranged and is certified by him. See Quarter Report of Attorney General, Vol. 60, page 63. Such an agreement would, of course, have to be made with the consent of the register since he is the one charged with the duty of preparing the transcript.

With regard to your second inquiry, Title 7, Section 769, Code of Alabama 1940, provides in part that in equity cases the transcript must be filed in the office of the Clerk of the Supreme Court within sixty days from the date of the taking of the appeal. This section has not been amended or repealed, and, insofar as it pertains to equity cases, is still in full force and effect. There is no conflict between it and Act No. 886, supra, for the reason previously mentioned, namely, that this Act does not apply to equity cases. However, your attention is called to the case of *Hinson v. Cook*, 241 Ala. 70, 1 So. 2d 33, which held that an appeal will not be dismissed, nor the judgment affirmed on certificate, for failure to file the transcript within sixty days, provided that the transcript is on file and the cause is ready for submission on the merits at the first call of the division from which the appeal comes. In this connection see also *Blair v. Thompson*, 255 Ala. 613, 52 So. 2d 692.

Very truly yours,

SI GARRETT

Attorney General

February 5, 1953

Hon. O. E. Cole, Chairman

County Commission

Russell County

Phenix City, Alabama

Counties—Russell County—Gasoline—Gasoline Fund—Roads
and Bridges—Road and Bridge Fund.

The provision in Section 9 of Act No. 520, General and Local Acts 1949, page 776, that the chairman and other members of the County Commission of Russell County shall receive salaries payable from those funds in the county treasury or depository "as may legally be subject to the payment of such salaries,"

does not authorize payment of part of these salaries from the county road and bridge fund or from the gasoline tax fund.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1952, is as follows:

"Will you kindly render to the Russell County Commission an opinion upon the following:

"Under the Act approved August 30, 1949, Acts of Alabama 1949 page 776 prescribes the duties of the members of said Commission. More than two thirds of their duties have to do with the County Road System.

"Section 9 of said Act reads in part as follows: * * * The salaries of said Commissioners are payable in twelve equal monthly installments out of the County Treasury or County Depository, and from such funds of the County as may legally be subject to the payment of such salaries and as in the opinion of said County Commission said salaries should be paid out of.'

"Can said County Commission pay part of their salaries from the Road Maintenance Fund for the performance of their Road and Bridge duties and part from the General Fund for the performance of their duties otherwise?

"Unless some provision is made for the relief of the County General Fund on account of the recent adoption of Constitutional amendment No. 1, our General Fund will when the Governor proclaims said amendment adopted be in the 'RED' by several thousand dollars and it will be difficult for the County to function."

Section 9 of Act No. 520, General and Local Acts 1949, page 776, does not authorize payment of a portion of the salaries of the chairman and members of the Russell County Commission out of gasoline tax monies or out of the county's road and bridge fund. Phraseology in Section 9, that these salaries may be paid "from such funds of the County as may legally be subject to the payment of such salaries," is not authority for payment out of these funds. The local act involved, therefore, is colorless on this question, and this opinion is based on the general state of the law without specific local permission from the legislature.

The statutes are clear on the use of gasoline tax monies. Title 51, Section 647, Code of Alabama 1940, as last amended by Act No. 649, General and

Local Acts 1949, page 968, allows the payment of per diem and mileage to members of the county governing body when engaged in supervising the construction, improvement, and maintenance of highways, bridges, and streets. Payment of salaries generally, however, is not within the purview of this section. It is especially note-worthy that where the legislature desired to authorize compensation for members of county governing bodies out of gasoline fund monies, it knew how to do so. Furthermore, the legislature presumably did not think the general phraseology, "construction, improvement, and maintenance and supervision," included compensation sufficiently clearly, and thought that specific phraseology allowing compensation for mileage and per diem was necessary.

In contrast, it is significant that Title 51, Section 657, Code of Alabama 1940, as last amended by Act No. 20, General Acts 1943, page 20, setting out the scheme for division of the tax to counties, provides only that that gasoline tax money going to the counties "shall be used . . . exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties." Here, there is not even the amplified definition of the word "supervise" which is found in Section 647, as amended, *supra*.

This office has written many times on the subject of the proper use of gasoline tax funds. These opinions have held, in the absence of a specific local act authorizing use of these funds for the payment of the salaries of the members of county governing bodies, that these funds may not be used for such payment. See Quarterly Report of Attorney General, Vol. 4, page 139, which stated:

" . . . (T) he compensation of members of such boards, operating under the general law, could not be paid out of the gasoline fund, even while they were engaged in supervising the maintenance and construction of roads in their respective districts."

See also, Quarterly Report of Attorney General, Vol. 3, page 16, which held that, in the absence of special legislation, gasoline tax funds must be expended exclusively on the construction and maintenance of roads.

The salaries involved in the instant situation, and set out in Section 9 of Act No. 520, *supra*, are to be compensation for all the duties performed by the chairman and members of the county commission. Obviously, there are duties which are unconnected with the construction, maintenance, and operation of roads and bridges. Therefore, opinions of this office holding that the county engineer's salary (Quarterly Report of Attorney General, Vol. 2, page 215), and compensation to a clerk for keeping road and bridge fund records (Quarterly Report of Attorney General, Vol. 52, page 169), are inapposite. And, when this office held that traveling expenses of county officials incurred in attending the National Convention of the National Association of County Officials were properly paid from the gasoline fund

(Quarterly Report of Attorney General, Vol. 41, page 46), it was pointed out very carefully that "the purpose of the meeting was to promote the construction and maintenance of public roads and bridges by means of educational lectures, exhibits, and demonstrations to be had at such meetings."

So far as monies raised by the county which go into the road and bridge fund are concerned, the limitations in Section 215, Constitution of Alabama 1901, control their expenditure. Section 215 requires that monies levied pursuant to the authorization therein must be applied to pay present or future debts or liabilities incurred because of "the erection, construction or maintenance" of necessary public buildings, bridges, or roads. The section further provides that "taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

Clearly, the payment of salaries to members of a county governing body is not within the "purposes" of Section 215. An early opinion of this office in Office Edition, Vol. 4-A, page 3, so held.

In conclusion, there is no authority for payment of any part of the salaries of the chairman or members of the Board of County Commissioners of Russell County out of gasoline tax funds distributed to that county or out of the road and bridge fund of the county.

I have not considered disposition of revenues affected by the constitutional amendment proposed by Act No. 755, General and Local Acts 1951, page 1305, submitted November 4, 1952, and proclaimed ratified November 19, 1952. This amendment restricts the expenditure of monies derived from certain taxes relating to motor vehicles and fuels. The amendment and the disposition of revenues thereunder has been the subject of an exhaustive recent opinion of this office to Hon. T. C. Almon, Judge of Probate, Morgan County, dated December 8, 1952, Ms.) a copy of which is enclosed.

Very truly yours,

SI GARRETT

Attorney General

February 10, 1953

Hon. W. H. Walker

Executive Secretary

Board of Education

Lauderdale County

Florence, Alabama

Schools—County Boards of Education—Lauderdale County.

1. Revenue accruing to the County Board of Education of Lauderdale County from the taxes levied by Act No. 296, General and Local Acts 1949, page 426, may be used by such board in payment of items of expense incurred either in capital outlay, construction or maintenance of public schools of Lauderdale County situated outside the limits of the city of Florence.

2. The term, "capital outlay," as used in such Act includes within its meaning such items of expense as new school sites, new equipment, such as desks, chairs, heating equipment, new school buses, and new shop maintenance equipment, while expense incurred in the erection of new buildings is authorized either as an expense chargeable to capital outlay or construction.

3. The term, "maintenance of the public schools," includes within its meaning such expenses as those incurred in painting, repairing, floor maintenance, or purchase of machines and floor finishing materials, such as brushes, brooms, floor compounds, and floor oils used in the maintenance of public schools and school buildings of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 21, 1953, is as follows:

"In 1949 The Lauderdale County Board of Education and Florence City Board of Education sponsored Local Act 296—H 777 Rogers, Barnett levying a Gross Receipts Tax in Lauderdale County for school purposes. Section 11 of said Act states, 'All revenue arising from the taxes hereby levied applicable to Lauderdale County outside the limits of the City of Florence shall be used exclusively for school purposes and solely for

capital outlay, construction and maintenance, of the public schools of Lauderdale County outside the limits of the City of Florence.'

"The intent of the Law was to construct new buildings, maintain present buildings and to purchase new equipment.

"The Board has interpreted capital outlay to include the following items: new school sites, new buildings, new equipment, such as desks, chairs, heating equipment, new school buses and new shop maintenance equipment. The Board has interpreted maintenance as applied to Local Act to contain such items as painting, repairs, floor maintenance, machines and floor finishing materials such as brushes, brooms, floor compounds and floor oils.

"Has Lauderdale County Board of Education been right in their interpretation of the application of Local Act 296 and can funds be legally spent for items enumerated above from the Gross Receipts Tax?"

As noted in your inquiry, the Legislature by the passage of Act No. 296, General and Local Acts 1949, page 426, levied in Lauderdale County, Alabama, including the city of Florence, a special gross receipts tax. The details of such tax, together with the method and manner of levying and collecting the same, is not here pertinent in view of the fact that your inquiry relates solely to the use of the proceeds arising therefrom. Here again, your inquiry is further restricted by reason of the fact that the revenue arising from such tax applicable to the city of Florence does not accrue to the board of education of such city until five years subsequent to the date of the commencement of such levy, and in the interim is payable to the city of Florence for the general fund of such city, and is subject to disbursement for general purposes of the city. Hence, it is only necessary that I consider the provisions of Section 11 of Act No. 296, *supra*, relating to the use to be made of revenue arising from the taxes levied by said act applicable to Lauderdale County outside the limits of the city of Florence. Such section provides as follows:

"All revenue arising from the taxes hereby levied applicable to Lauderdale County outside the limits of the City of Florence shall be used exclusively for school purposes and solely for capital outlay, construction and maintenance, of the public schools of Lauderdale County, outside the limits of the City of Florence."

It is to be noted that it is first provided that the revenue so arising shall be used "exclusively for school purposes," and, secondly, apparently for purposes of further clarification or for further restriction on the use of such revenue, that the same shall be used "solely for capital outlay, construction and maintenance, of the public schools of Lauderdale County, outside the limits of the City of Florence." I might here observe that it is doubtful that the second qualification as to the use to be made of such

revenue served to impose any further restriction on such use inasmuch as the terminology, "maintenance of the public schools," is itself broad and extensive in scope. The opinion of the Supreme Court, in the case of *Davis v. City of Tuscumbia*, et al, 236 Ala. 552, 183 So. 657, treats a somewhat similar situation as that presented in your request. There, a local tax had been imposed with the proceeds derived therefrom to be used "only for the purpose of supporting and maintaining the public schools of said city." (Emphasis supplied.) In considering the question of whether such proceeds could be used for new construction of a school building, the court observed:

"... The 'support and maintenance' of public schools is quite inclusive, tantamount to general public school purposes. When applied to a levy running into the indefinite future, during which the housing of the school may become essential to the maintenance of same, we are of opinion such use is not an unlawful diversion of such funds."

I am, therefore, of the opinion that, as a general proposition, all of the items of expense mentioned by you in your request for opinion properly fall within the category of expenses allowable in connection with the "maintenance of the public schools."

Even considering the language of Section 11, *supra*, in a more restrictive sense, that is, that same refers only to school buildings, as intimated by you in your request, I am still of like opinion. The items of expense mentioned by you in your request are, namely, new school sites, new buildings, new equipment, such as desks, chairs, heating equipment, new school buses, and new shop maintenance equipment, which you state the County Board of Education to consider as capital outlay as authorized by Section 11, *supra*. I am in agreement that all of such items of expense are authorized expenditures under the provisions of Section 11, *supra*, either as capital outlay or construction, as in the case of erection of new buildings.

You likewise mention a second category of expenses which you advise the County Board of Education has considered as constituting maintenance within the meaning of Section 11, *supra*. These include painting, repairs, floor maintenance, machines and floor finishing materials, such as brushes, brooms, floor compounds and floor oils. Here again, I am in agreement with the interpretation of the County Board of Education, and I am of opinion that payment of such items of expense is authorized from the revenue accruing under the terms of Act No. 286, *supra*, inasmuch as I feel the payment of such items to constitute maintenance of the public schools of the county, as authorized by Section 11 of such Act.

Very truly yours,

SI GARRETT

Attorney General

February 11, 1953

Hon. Ashford Todd

Probate Judge

Madison County

Huntsville, Alabama

Judges of Probate—Infants—Insane Persons—Funds—Guardians
—Executors and Administrators.

Guardians or administrators may, on final settlement of estates, satisfy decrees rendered against them in favor of minors or persons of unsound mind for amounts of \$500.00 or less by payment to probate judge, under provisions of Title 21, Section 99, Code of Alabama 1940, as amended by Act No. 363, General Acts 1943, page 337, said funds to be disbursed as provided by Title 21, Section 101, Code of Alabama 1940.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of January 30, 1953, is as follows:

"I will appreciate it if you will give me your opinion on the following matter:

"May amounts less than \$500.00 paid into Probate Court on final settlement by guardians or administrators in satisfaction of decrees rendered against them in favor of minors, or persons of unsound mind, having no guardians, be held in custody and disbursed by a Probate Judge under the provisions of Title 21, Chapter 4, Code of 1940?"

As a general rule, no one but a regularly qualified guardian of a minor could receive payment and enter satisfaction of a judgment in favor of such minor. *Collins v. Gillespy*, 148 Ala. 558, 41 So. 930.

However, under Title 13, Section 293, Code of Alabama 1940:

"Money due on decrees for the payment of money, rendered against any executor, administrator, or guardian, on a partial or final settlement, may be paid to the judge of probate, and it is his duty to pay over the same to the person entitled thereto on demand upon proper proof of identity or authority; . . ."

It has been held that this statute makes the probate judge in his official capacity the custodian in a proper case of such funds to any amount, whether due to adults or minors. *Roberts v. Hunt*, 212 Ala. 475, 103 So. 451.

Under the authority of Title 21, Sections 7 and 8, Code of Alabama 1940, the judge of probate may appoint a general guardian for the county, who acts when no other person applies for appointment and qualifies. If there be no general guardian or general guardian for the county, the guardianship attaches to the office of sheriff. This is likewise true as to persons of unsound mind. Title 21, Section 24, Code of Alabama 1940.

Where, however, the sum due a minor or person of unsound mind is \$500.00 or less, Title 21, Section 99, Code of Alabama 1940, as amended by Act No. 363, General Acts 1943, page 337, provides as follows:

"The funds of a minor or person of unsound mind, not having a general guardian, not exceeding in amount five hundred dollars, may be paid to the judge of probate of the county in which said minor or person of unsound mind resides, if a resident of the state, or if a nonresident, to the judge of probate or like officer of the county in which the debtor or creditor resides; and the person from whom said sum is due may discharge himself by making such payment."

It has been held that one purpose of a statute of this nature is to avoid the expense of a general guardianship over small estates. *Roberts v. Hunt*, supra.

It is my opinion that where the decree on final settlement discharges the guardian so that the minor or person of unsound mind does not then have a general guardian, any sum in amount of \$500.00 or less due a minor or person of unsound mind may be paid to the probate judge by the guardian, or administrator, in satisfaction and discharge of the decree of the probate court fixing his liability to the minor or person of unsound mind. It is my further opinion, however, that since said Section 99, as amended, supra, provides that the funds "may be paid to the judge of probate," the one making the payment must designate that the payment is being made under the terms of said section. When so designated, the funds are then subject to disbursement by the probate judge as provided by Title 21, Section 101, Code of Alabama 1940. If this designation is not made, it might be held that the payment was made under said Title 13, Section 293, Code of Alabama 1940, and be subject to disbursement as provided therein.

Yours very truly,

SI GARRETT

Attorney General

February 11, 1953

Hon. James F. Hester

Judge of Probate

Franklin County

Russellville, Alabama

Counties—Franklin County—Funds—Roads and Bridges.

1. Under provisions of Act No. 143, General and Local Acts 1951, page 378, funds held by Franklin County for the construction, maintenance, and repair of county roads and bridges should be transferred and turned over to the State Highway Department in order that such funds may be used to pay outstanding claims against Franklin County incurred in the construction, maintenance, and repair of county roads and bridges.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1953, is as follows:

"Upon the effective date, June 29, 1951, of Local Act No. 143 1951 Acts 378, Franklin County owed debts incurred for work on the public roads and bridges of the county, which are still outstanding and unpaid. There was at that time funds in the treasury of the county available for paying said debts, but the county sought a construction of said act by the courts, which is pending. These creditors have been waiting a long time, and we would like very much to pay their claims. The claims are for materials furnished the county. Please advise me if the county is authorized to pay said claims with said frozen funds? In the event your reply is in the negative, is the county authorized to transfer and turn over to the State Highway Department said frozen funds to be used by it to pay said claims, and if this procedure is indicated, please further advise the necessary steps or action on the part of the county to make such transfer."

Under the provisions of Act No. 143, General and Local Acts 1951, page 378, the State Highway Department is authorized and directed to take over the highway system of Franklin County. By the terms of the same act, Franklin County is directed to turn over to the State Highway Department all funds, supplies, equipment, machinery, and materials held, owned, leased, or controlled by the county for the construction, maintenance and repair of county roads and bridges.

Section 6 of Act No. 143, supra, provides in part as follows:

"After the effective date of this Act, the State Highway Department shall pay all of the outstanding financial obligations of Franklin County which were incurred prior to the adoption of this Act, for the construction, maintenance or repair of county roads and bridges out of the funds to be paid over to the Highway Department under the provisions of Section 4 of this Act. . . ."

As you have stated, the county governing body brought a bill for declaratory judgment seeking to have Act No. 143, supra, declared unconstitutional. On January 9, 1952, the Franklin County Circuit Court, sitting in Equity, rendered a decree upholding the constitutionality of Act No. 143, supra. From that decree, the county appealed to the Supreme Court of Alabama and the case is still pending in that court.

Since Act No. 143, supra, has never been declared unconstitutional, it is my opinion that it remains in full force and effect and its provisions must be followed. The decree of the Circuit Court of Franklin County, in Equity, contained no injunction which would prohibit the county governing body from acting under the provisions of this act. It is my opinion, therefore, that if it is your desire to pay creditors of the county for debts incurred for work on the public roads and bridges prior to the effective date of Act No. 143, supra, it is incumbent upon the county governing body to transfer to the State Highway Department all road and bridge funds now being held by Franklin County, contrary to the provisions of Act No. 143, supra. The duty will then be upon the State Highway Department to disburse these funds to the various creditors as their interests appear.

Yours very truly,

SI GARRETT

Attorney General

February 11, 1953

Hon. A. L. Spence, Chairman

Board of Revenue

Limestone County

Athens, Alabama

Counties—Bonds—Hospitals—Funds—Limestone County.

1. Surplus derived from the sale of bonds under the provisions of Title 12, Section 92, et seq., Code of Alabama 1940, for the purpose of constructing a hospital, not necessary to complete the project, may be used solely for the payment of principal and interest on said bonds.

2. Surplus proceeds of bond issue not necessary to be used for constructing a county hospital may be used to establish a sinking fund for the payment of the principal and interest on said bonds.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 19, 1952, is as follows:

"A special election was held in Limestone County, Alabama, on May 4, 1948 to determine whether or not the County could issue Hospital Bonds in an amount not to exceed \$200,000.00 for the construction of a hospital under the Hill-Burton Act.

"Said election carried by a good majority and the County issued bonds in the sum of \$194,000.00. Later the Federal Government assumed more of the total cost of the hospital thereby creating a surplus of approximately \$40,000.00 from the sale of the above mentioned bonds.

"Please advise me as to just how this money can be used.

"1. Can it be used for the operation and maintenance of the hospital?

"2. Can it be used for the retirement of the bonds? Said bonds are not subject to call until June, 1958.

"3. Just what purpose can this money be used for?"

You have supplemented your inquiry of July 19, 1952, supra, by the following letter of November 26, 1952:

"I submit the following excerpts from the Minutes of the Limestone County Board of Revenue in hopes of furnishing you the information you requested in your letter of October 30, 1952.

"1. Authorization of Bonds.

"Pursuant to the applicable provisions of the constitution and laws of the State of Alabama, including particularly Chapter 7 of Title 12 and Chapter 6 of Title 37 of the Code of Alabama of 1940, as amended, and pursuant to authority so to do granted at an election of the qualified electors of the County held in the County on May 4, 1948, there are hereby authorized to be issued by the County \$194,000.00 principal amount of its Hospital Bonds (Herein Called 'the Bonds') for the purpose of constructing a hospital building in and for the county.

"2. Official Ballot, Special County Bond Election, Limestone County, Alabama, May 4, 1948.

"Shall the County of Limestone in the State of Alabama issue not exceeding \$200,000.00 principal amount of its Hospital Bonds for the purpose of constructing a hospital building in and for the County, which bonds shall bear interest at a rate not exceeding 4% per annum payable semi-annually on December 1 and June 1, shall be numbered from 1 to 200, inclusive, shall be in the denomination of \$1,000 each, shall mature and be payable in their numerical order on June 1 in the aggregate principal amount of \$6,000 in each of the years 1949 to 1954, inclusive, \$7,000 in each of the years 1955 to 1957, inclusive, \$8,000 in each of the years 1958 to 1960, inclusive, \$9,000 in each of the years 1961 to 1963, inclusive, \$10,000 in 1964, \$11,000 in each of the years 1965 and 1966 and \$12,000 in each of the years 1967 to 1971, inclusive, those maturing in 1959 and thereafter being subject to redemption at the option of the county after not less than thirty days' prior published notice, as a whole or in part in the inverse order of their numbers, on any interest payment date on and after June 1, 1958, at the face value thereof plus a premium equal to twelve months interest thereon computed at the rate they would bear on the redemption date if they had not been called for redemption.

"() For said proposed County of Limestone Hospital Bonds.

"() Against said proposed County of Limestone Hospital Bonds.

"3. Official Ballot, Special County Tax Election, Limestone County, Alabama, May 4, 1948.

"Shall the County of Limestone in the State of Alabama levy and collect, in addition to all other taxes authorized by law, a special County

tax, not exceeding 2 mills on each dollar of taxable property in the County, to be used solely for acquiring, by purchase, lease or otherwise, constructing, operating, equipping or maintaining county hospitals, or other public hospitals, non-profit hospital and public health facilities?

"() For said proposed special county tax.

"() Against said proposed special county tax.

"4. Pledge.

"The bonds shall be and constitute general obligations of the county for the payment of the principal of and interest on which the full faith and credit of the county are hereby irrevocably pledged. In addition thereto, the county does hereby appropriate and agree to use and does hereby pledge for payment of the principal of and interest on the bonds, and said principal and interest shall respectively mature, so much as may be necessary for such purpose of the special ad valorem tax of $\frac{1}{4}$ of 1% authorized to be levied and collected annually by the county under the provisions of Section 215 of the Constitution of Alabama for the erection, construction and maintenance of necessary public buildings, bridges and roads. The County agrees that so long as the principal of or interest on the bonds remains unpaid it will annually levy and collect at the times and in the manner provided by the constitution and laws of Alabama, for payment of the principal and interest respectively on the bonds as the said principal and interest respectively mature, so much of the said special ad valorem tax as may be necessary for said purpose, and it will apply the proceeds thereof when collected for payment of the principal of and interest on the bonds.

"As for the use of this money I do not have any wish to use it other than for the hospital in whatever way it can be used."

I am of the opinion that the surplus now held by the county which was derived from the sale of hospital bonds must be used in accordance with Title 37, Section 261, Code of Alabama 1940, as amended by Act No. 394, General Acts 1945, page 612.

It appears from your inquiry that the hospital bonds which were issued by Limestone County were issued under the provisions of Section 222, Constitution of Alabama 1901, Title 12, Section 92, et seq., Code of Alabama 1940, and Title 37, Sections 254-273, Code of Alabama 1940, as amended. It is well to point out that those excerpts from the minutes of the Limestone County Board of Revenue, quoted in your inquiry, authorize the bond issue for the "purpose of constructing a hospital building." The official ballot appears to ask the question, "Shall the County of Limestone . . . issue . . . hospital bonds for the purpose of constructing a hospital

building?" The question submitted to the voters concerning the levying of a special tax not exceeding two mills is so phrased that the tax may be used "solely for acquiring, by purchase, lease or otherwise, constructing, operating, equipping or maintaining county hospitals, or other public hospitals."

The pledge indicates that the special tax levied and collected under the provisions of Section 215 of the Constitution of Alabama 1901 may be used for the "erection, construction and maintenance of necessary public buildings." So far as the bonds are concerned, therefore, it appears that, both in the authorization of the bonds and in the question submitted on the ballot to the electorate, the proceeds derived from the bond issue would be used solely for construction.

When a county issues bonds of this type, the statutes require that the purpose for which the election is to be held, and the purpose for which the bonds are to be issued, shall be stated in the notice of election. Title 12, Section 94, Code of Alabama 1940; Section 261, as amended, *supra*; Board of Revenue of Etowah County v. Hutchins, 250 Ala. 173, 33 So. 2d. 737.

It is to be presumed that the notice of election which was issued by the county under the provisions of Section 94, *supra*, conformed to the question submitted on the official ballot and to the authorization of the bonds as quoted in your inquiry. The purpose stated is for the construction of the hospital building, and does not provide that the proceeds of the bonds may be used for maintenance or operation of the hospital. Since there is a surplus derived from the proceeds of the sale of the bonds which is not necessary to be used for construction, the question is the disposition of such surplus.

Section 261, as amended, *supra*, provides in Section 1 thereof as follows: "The principal proceeds received in the sale of any bonds hereafter issued under the authority of this chapter, shall be used for the purposes for which the bonds are issued; provided, however, that if for any reason any part of such proceeds shall not be necessary for such purposes then such unexpended part of such proceeds shall be applied to the payment of the principal of or interest on said bonds. All accrued interest and premium received in any such sale shall be applied to the payment of interest or principal on the bonds sold."

The surplus referred to in your inquiry, therefore, must be applied to the payment of the principal or interest on said bonds.

Some cases indicate that such a surplus can be applied to other county debts when the purposes of the bond issue have been accomplished. See, Board of Revenue of Shelby County v. Farson, Son & Co., 157 Ala. 375, 72 So. 613. However, the bonds issued by Limestone County for the purpose of constructing a hospital are governed by Section 261, as amended, *supra*.

Title 12, Section 109, Code of Alabama 1940. Therefore, the statutes provide for the disposition of the surplus of the bond issue in a particular manner, and it is necessary that the surplus be disposed of in the manner directed. *Jefferson County v. Henry*, 204 Ala. 381, 86 So. 44.

It is clear, therefore, that the surplus unexpended for construction and derived from the sale of the hospital bonds must be used for the payment of the principal or interest on said bonds.

It is stated in your inquiry that the bonds are not subject to call until June of 1958. You are advised that the surplus may be invested by the county governing body as provided for in Title 37, Section 265, Code of Alabama 1940, and Act No. 246, General Acts 1943, page 203. See, Quarterly Report of Attorney General, Vol. 53, pages 188-192. Of course, this sinking fund so established must be used solely for the payment of principal and interest as required by Section 261, as amended, *supra*.

Yours very truly,

SI GARRETT

Attorney General

March 13, 1953

Hon. Q. P. Flournoy, Mayor

Town of Chickasaw

Mobile County

Chickasaw, Alabama

Recorder's Court—Bail—Forfeitures.

1. Statutes do not prescribe the maximum amount of appearance or bail bond in recorder's court.
2. Bail or appearance bonds in recorder's court should not exceed the amount of \$300.00, because that amount is fixed as the maximum for an appeal to the circuit court after conviction in recorder's court.
3. A recorder's court has authority to forfeit a bail or appearance bond in its full amount.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 26, 1953, is as follows:

"I shall appreciate it if you will advise me whether or not Section 585 of Title 37 of the 1940 Code of Alabama which sets the maximum fine for a Recorder's Court at \$100.00, has the effect of placing a similar limit on the amount which may be forfeited under an appearance bond.

I shall appreciate your specifically advising me the maximum appearance bond which can be required in a case on the City Docket, and in the event you advise that the maximum bond is \$300.00 I shall appreciate your advice concerning whether or not this bond may be forfeited by the Recorder."

In my opinion there is no express statutory provision limiting the amount of an appearance or bail bond in recorder's court, but presumably such bond should not exceed \$300.00.

It is further my opinion that in the event of a forfeiture the recorder's court has the power to order forfeited the amount stated in the bond, which may be \$300.00.

Title 37, Section 582, et seq., Code of Alabama 1940, provides for proceedings in recorder's court. I do not find that these statutes prescribe a maximum amount which may be set as the penalty in a bail or appearance bond in the recorder's court. Therefore, if a person is charged with violating a municipal ordinance, the recorder may set the defendant's bond to appear in the recorder's court in any reasonable amount. *Moore v. State*, 26 Ala. App. 607, 164 So. 761. I call your attention to the fact that when a defendant appeals from a judgment of conviction in the recorder's court, the appeal bond, conditioned to appear in the circuit court, cannot exceed the amount of \$300.00. Title 37, Section 587, Code of Alabama 1940. It appears to me that since the Legislature has placed a maximum amount on a bond for the appearance of the defendant in the circuit court after his conviction in recorder's court, then an amount in excess of \$300.00 would probably be unreasonable in connection with a bond for the defendant's appearance in recorder's court. Certainly, the amount of the bond insuring the appearance of the defendant for his trial in the recorder's court should not be in excess of the amount of the bond (\$300.00), which is the maximum allowed after the defendant has been convicted and appeals to the circuit court.

I am informed that recorder's courts have adopted the policy of never requiring an appearance or bail bond conditioned to appear in the re-

recorder's court in excess of \$300.00. This custom is based upon the fact, previously stated, that the maximum amount of recorder's court bond should not exceed the statutory maximum for an appeal bond.

Of course, when a recorder is sitting as a committing magistrate in a preliminary hearing, he may set a bond in any reasonable amount. Section 587, *supra*.

The recorder's court, having the power and authority to fix an appearance bond, would also have the power and authority to declare that bond forfeited in full. Title 37, Section 597, Code of Alabama 1940, provides in part as follows:

" . . . Such recorder shall have power coextensive with county courts in such jurisdiction to issue writs and all other process, and to approve and declare bonds forfeited."

Furthermore, a city recorder has the power of an *ex officio* justice of the peace in criminal matters. Title 37, Section 585, Code of Alabama 1940. And, justices of the peace are authorized to forfeit bail bonds. Quarterly Report of Attorney General, Vol. 21, page 140.

Yours very truly,

SI GARRETT

Attorney General

March 13, 1953

Hon. Arthur K. Wood

Clerk of the Circuit Court

Talladega County

Talladega, Alabama

Talladega County—Inferior Courts—Clerks of Circuit Courts—
Final Record—Costs and Fees.

1. In taxing costs and fees of officers in the Intermediate Court of Talladega County, the clerk must use an appropriate schedule of fees depending upon the type of case.
2. The Intermediate Court of Talladega County has the sole and exclusive jurisdiction over violations of the rules of the

road and other misdemeanors provided for in Title 36, Code of Alabama 1940.

3. In certain cases the Clerk of the Intermediate Court of Talladega County must prepare a final record .

4. The Clerk of the Intermediate Court of Talladega County must keep a minute book.

5. There is no docketing fee for cases docketed in the Intermediate Court of Talladega County, but a trial tax is to be collected.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 6, 1953, is as follows:

"It is hereby requested that you give me your opinion on certain matters concerning a new court which has been created in Talladega County, and been effective since January 20, 1953.

"According to Alabama Acts of 1951, number 733, an Intermediate Court has been created in lieu of the County Court, the Juvenile Court and the Inferior Court of Talladega County, Alabama, making the clerk of the Circuit Court the clerk of the court herein established. "Section 7, (b) is confusing as to officers of the Court's costs, as it has been broken down into four different categories, making it very difficult for me as clerk to keep straight.

"Under this section should I charge costs for officers of the court as per costs charged in Circuit Court, County Court and Justice Court, according to which court the case may fall under?

"Section 8, (b). All warrants issued in Talladega County for misdemeanors for violation of the rules of the road and other misdemeanors defined or provided for in Code of Alabama 1940, Title 36, shall be returnable to the Intermediate Court of Talladega County, Alabama, and shall be there tried. Except as to the trial tax herein provided, the court costs in such cases shall be the same as in the courts of Justices of the Peace.

"Does this mean that the Intermediate Court as now established is the only court in Talladega County that has jurisdiction over rules of

the road, and that Justice of the Peace no longer can try such offenses in this County?

"Should there be a final record fee charged, since Justice of the Peace is not a court of final record?

"Section 11, (b). It shall be the duty of the clerk to keep all records, files and dockets of the court in an orderly manner and to perform all other duties required by the judge.

"Is the Intermediate Court of Talladega County as created by the 1951 Acts of Alabama, number 733, a court of final record? Should all cases, both civil and criminal, be recorded in the final record docket, and should minutes be kept for said court on all cases?

"Please advise what the docketing fee should be for this Court."

The Intermediate Court of Talladega County, Alabama, was created by Act No. 733, General and Local Acts 1951, page 1281. The Intermediate Court so created has both criminal and civil jurisdiction and is said to be "in lieu of the county court and the juvenile court of said county, and the Inferior Court of Talladega, Alabama." Those courts are abolished by Act. No. 733, supra, and exclusive jurisdiction over matters which were formerly cognizable before the county, juvenile, and inferior courts of Talladega County is granted to the Intermediate Court. Section 1, Act No. 733, supra.

Your first question involved Section 7(b) of Act No. 733, supra. You ask what is the proper schedule of fees to be charged in the various cases now cognizable in the Intermediate Court. Section 7 of Act No. 733, supra, provides as follows:

"Section 7. Costs. (a) For their attendance upon the court, witnesses shall be entitled to the fees and allowances prescribed by law for witnesses in the county courts, which fees and allowances shall be taxed, collected, and paid in the same manner and according to the same regulation as apply in the circuit courts.

"(b) In addition to the fees for witnesses, the court shall have authority to tax costs and commissions for the use of the officers of the county as follows: (1) in each civil action at law, if the sum in controversy does not exceed one hundred dollars (\$100.00), the sum as in justice courts; (2) in every other civil action at law, the same as in the circuit court; (3) in each criminal case involving an offense of which justices of the peace have final jurisdiction, the same as in justice courts; (4) in every other criminal case, the same as in county courts, including fees as provided by Sections 86 and 87 of Title 11 of

Code of 1940, except that fees for cases provided for hereinafter under Section 8(b) the fees shall be as there stated.

“(c) A trial tax of one dollar (\$1.00) shall be collected for the use of the county in each civil action at law, if the sum in controversy does not exceed one hundred dollars (\$100.00). In every other civil action at law, and in every criminal case, a trial tax of two dollars (\$2.00) shall be collected for the use of the county.

“(d) No costs shall be taxed in juvenile cases.”

Section 8(b) of Act No. 733, supra, provides as follows:

“(b) All warrants issued in Talladega County for misdemeanors for violation of the rules of the road and other misdemeanors defined or provided for in Code of Alabama 1940, Title 36, shall be returnable to the Intermediate Court of Talladega County, Alabama, and shall be there tried. Except as to the trial tax herein provided, the court costs in such cases shall be the same as in the courts of justices of the peace.”

As stated in your inquiry, the costs and fees to which officers of the Intermediate Court are entitled are divided into four categories. In civil cases at law officers of the Intermediate Court receive either, (1) those fees chargeable in justice of the peace courts, or (2) circuit court fees. If the civil action at law is a controversy where the amount of \$100.00, or less, is claimed, then the schedule of fees to be taxed is the same schedule as would be used in justice of the peace courts. In such actions the clerk, the sheriff, or other officers of the Intermediate Court would receive the same fees as would be taxable had the action been commenced in a justice of the peace court.

On the other hand, if the civil action at law filed in the Intermediate Court claims more than \$100.00, the officers of the court should receive circuit court fees.

In criminal cases arising in the Intermediate Court of Talladega County, the costs and fees which may be taxed and collected for officers of the court are subdivided into two categories. If the criminal case is of the type that justices of the peace have final jurisdiction or if the criminal case is a misdemeanor for violation of the rules of the road, or other misdemeanors provided for in Title 36, Code of Alabama 1940, then the court costs and officers' fees are determined from the schedule of fees allowed in justice of the peace courts. If the criminal case is of a type over which a justice of the peace does not have final jurisdiction, the clerk should tax and collect costs for the officers of the Intermediate Court the same fees as would be taxed and collected in county courts.

It is necessary, therefore, that in taxing and collecting costs in the Intermediate Court of Talladega County that the clerk of the court select the proper schedule of fees depending upon the type of case as outlined above.

Your second question is whether or not the Intermediate Court has the sole and exclusive jurisdiction over offenses involving the violation of the rules of the road. It is clear from the provisions of Section 8(b), *supra*, that when a warrant is issued by any magistrate or other authorized person in Talladega County for violation of the rules of the road, or other misdemeanors included within Title 36, Code of Alabama 1940, the warrant must be made returnable to the Intermediate Court and there tried. Since the Intermediate Court is the only court to which these warrants may be made returnable and since Section 8(b), *supra*, states that such causes shall be there (in the Intermediate Court) tried, it is my view that as to such cases the Intermediate Court has the sole and exclusive jurisdiction to try and determine such cases. It follows that justices of the peace in Talladega County, although they may issue warrants in such cases, have no jurisdiction to try and determine those cases, but must make the warrant returnable to the Intermediate Court.

Your third and fourth questions may be answered together. These questions involve the duty of the clerk in making final records.

Act No. 733, *supra*, does not expressly provide that the clerk of the Intermediate Court must make final records in all cases tried and determined by the Intermediate Court. It is my opinion, however, that in some cases, both civil and criminal, it is the duty of the clerk to make a final record.

Those cases in which the clerk must make a final record are as follows:

1. Civil cases in the Intermediate Court where the amount in controversy exceeds \$100.00.
2. Criminal cases of the type over which justices of the peace have no final jurisdiction and in which the clerk taxes the same costs as would be chargeable in the County court. You will note that this will exclude cases involving violation of rules of the road, or other misdemeanors provided for in Title 36, *supra*.

Circuit clerks are required to prepare final records. Title 13, Section 198, subsection 9, Code of Alabama 1940, as amended by Act No. 617, General Acts 1947, page 465. The final record, of course, includes all of those proceedings recorded by the clerk under the provisions of Title 7, Section 5, Code of Alabama 1940, as amended by Act No. 125, General and Local Acts 1949, page 150. Biennial Report of Attorney General, 1928-1930, page 558. In the case of *Swindle v. Crocker*, 217 Ala. 199, 515 So. 252, it was held

that a circuit clerk who is ex officio clerk of the county court is required to make a final record for county court cases because the fees and compensation of the clerk of the county court are the same as circuit court fees. In the *Swindle* case, supra, it was decided that since the clerk of the county court was entitled to the same fees as were taxed and collected in the circuit court, then his duties in the county court were the same as those in the circuit court. Hence, that it was the duty of the clerk of the county court to make final records the same as in the circuit court.

It is to be noted that in the Intermediate Court of Talladega County the clerk's fees in civil actions at law, where the amount in controversy is over \$100.00, are the same as those in the circuit court. Section 7(b)(2), Act No. 733, supra. It is further to be noted that the clerk's fees in criminal cases over which justices of the peace have no final jurisdiction are the same as county court fees. County court fees in such instances are provided for in Title 11, Section 87, Code of Alabama 1940, and so far as the clerk is concerned are circuit court fees.

Following the reasoning in the *Swindle* case, supra, the clerk of the Intermediate Court should prepare final records as he does in the circuit court in cases in the Intermediate Court which are civil in nature and involve an excess of \$100.00. He should also prepare final records in cases which are criminal in nature and are offenses over which justices of the peace have no final jurisdiction.

If the civil case involves an amount not exceeding \$100.00, or if the criminal case is one over which a justice of the peace would have final jurisdiction, then the clerk would receive only those fees which are appropriate in justice of the peace courts, and the reasoning of the *Swindle* case would not be applicable. Therefore, no final records need be prepared in such cases.

I have already stated above those cases in which it is necessary for the clerk to prepare a final record. You have also inquired as to whether or not the clerk should keep minutes on all cases in the Intermediate Court.

In my opinion, it is necessary that the clerk keep a minute book which should include all judgments, orders, and decrees of the court rendered in all cases. Section 11(b) of Act No. 733, supra, prescribes certain duties of the clerk. Subsection 4 of Section 11 (c) provides as follows:

"To enter all judgments, orders, and decrees of the court; . . ."

This duty of the clerk, in my opinion, requires that the clerk enter in a minute book all judgments, orders, and decrees of the court in all cases tried and determined by the court.

I find no "docketing fee" prescribed for cases docketed in the Intermediate Court of Talladega County. The trial tax to be collected in the Intermediate Court is provided for in Section 7(c) of Act No. 733, *supra*.

Very truly yours,

SI GARRETT

Attorney General

March 13, 1953

Hon. Lowell Hardin

Clerk of the Circuit Court

Tuscaloosa County

Tuscaloosa, Alabama

Clerks of Circuit Courts—Salaries—Counties—Merit System—
Tuscaloosa County.

1. Under the provisions of Act No. 498, General and Local Acts 1951, page 891, the circuit clerk, subject to county civil service system, has exclusive authority to select and fix compensation of employees in his office.
2. Under the provisions of Act No. 498, *supra*, the county governing body has authority to make appropriation to the circuit clerk's office for combined salaries or compensation of employees.
3. Under the provisions of Act No. 498, *supra*, the county governing body may not fix the compensation of individual employees of the circuit clerk.
4. Under the provisions of Act No. 498, *supra*, the circuit clerk, subject to the provisions of the county civil service system, having sole authority to fix compensation of employees, may pay said employees increased salaries retroactive to date of approval by the civil service system, provided at the time of the increase there existed a valid appropriation by the county governing body.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 2, 1953, is as follows:

"Re: Legislative Act No. 498, S.528 Skidmore, Vol. 1, Page 891 of Session of 1951.

"I am beginning my first term as Circuit Clerk of Tuscaloosa County, and I will indeed be grateful to you for your official opinion on a Legislative Act. In this first letter to you I will try to be as brief, but explicit as possible.

"For the Circuit Clerk's Office, the Board of Revenue budgeted \$1,000.00 per month for Clerk hire fund in October 1952, of which the former Circuit Clerk used the full amount.

"On February 7, the former Chief Clerk resigned, which left a vacancy in the office staff. I promoted a lady with 13 years experience in the office to fill the Chief Clerk's position. The Civil Service Board permitted me to employ a new girl in the office at a minimum salary of \$150.00 per month. The following salary tables will best illustrate my problem now:

"Clerks and Salaries on February 7th.

"Mr.s Flowers, Chief Clerk	\$235.00 per month
"Mrs. Davis, Clerk	215.00 per month
"Mrs. Bennett, Clerk	190.00 per month
"Mrs. Campbell, Clerk	190.00 per month
"Mrs. Kuykendall, Clerk	170.00 per month

Total	\$1000.00
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"Proposed Salary Changes on February 9th.

"Mrs. Davis, Chief Clerk	\$255.00 per month
"Mrs. Bennett, Clerk	205.00 per month
"Mrs. Campbell, Clerk	205.00 per month
"Mrs. Kuykendall, Clerk	185.00 per month
"Miss Thrower, New Clerk	150.00 per month

Total	\$1000.00
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"The Board of Revenue and the Probate Judge tell me that they cannot and will not allow me to make the proposed salary changes, but

it is my contention that Sen. Skidmore's act gives me the right to 'select and fix the compensation' of the clerks in the Circuit Clerk's Office.

"The Probate Judge wants me to leave the salaries like this:

"Mrs. Davis	\$235.00 per month
"Mrs. Bennett	190.00 per month
"Mrs. Campbell	190.00 per month
"Mrs. Kuykendall	170.00 per month
"Miss Thrower	150.00 per month

"This would mean that I would lose \$65.00 per month from the Clerk hire fund, but I have a chance to reward some faithful and deserving personnel with small salary raises. At the same time the Clerk's Office will still be operating within the limits of its salary budget.

"The salary checks for my clerks for the month of February were paid at the same rate as was suggested by the Probate Judge, but there is on file in the Board of Revenue Office my letter of request for the salary changes. If your decision should uphold my interpretation of the Act, will the salary changes be retroactive to the payroll of February?"

I am of the opinion that the circuit clerk has the sole and exclusive power, subject to the civil service system, to select and fix the compensation of his office employees.

It is further my opinion that the county governing body may fix the total appropriation for salaries for employees in the office of the circuit clerk and may change such appropriation at any time, but may not fix individual salaries.

Act No. 498, General and Local Acts 1951, page 891, authorizes the governing body of Tuscaloosa County to "provide sufficient equipment, supplies, clerks, deputies and other assistants to the . . . clerk of the circuit court . . . for the efficient operation . . ." of his office. Section 1 of Act No. 498, *supra*, further provides that the "clerk of the circuit court shall, subject to the civil service system, select, and fix the compensation of, such clerks, deputies and assistants . . ." for his office. It is clear, therefore, that the circuit clerk, subject to the provisions of the civil service system of the county, may choose his own employees and may fix their respective salaries. Of course, the civil service system of the county in all probability establishes pay scale brackets in which employees must be paid, but subject to this restriction the circuit clerk may pay his employees whatever amount he may desire.

Section 1 of Act No. 498, supra, further provides that the amount of the combined salaries or compensation of the employees in the office of the circuit clerk shall be fixed by a resolution of the county governing body. The county governing body is required to provide a lump sum amount for salaries in the clerk's office which is reasonable and necessary for the proper operation of the office. See also, Section 3 of Act No. 498, supra, which again refers to the combined salaries or compensation of office help. It is clear, therefore, that the county governing body should determine only the total amount necessary to be appropriated for the reasonable and necessary salaries in the clerk's office. The county governing body would not be authorized to fix salaries of individuals within the clerk's office as this matter is to be decided solely by the circuit clerk under the provisions of the civil service system.

Speaking from a practical standpoint, however, the county governing body has the power to increase or decrease the total amount of the appropriation to the clerk's office for salaries, and this power carries with it control, not over individual salaries but over the total amount of salaries paid in the clerk's office. The appropriation made by the county governing body to the clerk's office for salaries cannot properly specify individual employees and the rate paid. When an appropriation is made by the county governing body to the office of the circuit clerk for salaries, the circuit clerk may expend such appropriation for salaries in any amount respecting individuals as he may desire, subject to the civil service system.

In answer to your second inquiry, it is my opinion that if there existed a valid appropriation by the county governing body in the amount described in your inquiry, then the salary changes would become effective when approved by the circuit clerk and the county civil service system. If, therefore, at the time that the salaries referred to in your inquiry were raised by order of the personnel board, an appropriation existed and has not been changed by the county governing body, then the raises in salaries indicated would be retroactive to the date of the concurrence of the circuit clerk and the civil service system in the amount of said raises. It is unnecessary to obtain the approval of the county governing body in granting individual raises in salary, provided the raise can be effected within the appropriation to the clerk's office.

Very truly yours,

SI GARRETT

Attorney General

March 19, 1953

Hon. W. G. Pruett

Highway Director

Highway Department

C A P I T O L

Highways and Highway Department—Rights-of-way—Mines and Mining—Oils.

1. The State Highway Director has authority to grant or deny permits to oil companies desiring to conduct oil exploration seismograph surveys and other geophysical tests or experiments upon and under the rights-of-way of Alabama highways. Oil companies desiring to conduct such surveys must first obtain the permission of the State Highway Director.

2. Before oil exploration seismograph surveys are conducted on State highway rights-of-way, permission should be obtained from owners of mineral rights in land beneath such rights-of-way.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of January 21, 1953, is as follows:

"The Alabama State Highway Department has been asked by several of the major oil companies to permit the conduct of oil exploration seismograph surveys on and under the rights-of-way of various highways which constitute the highway system of Alabama. These surveys entail drilling holes approximately 100 feet deep and about 3,000 feet apart in the drainage ditches or behind that parallel the roads. A small charge of dynamite, usually from 5 to 15 pounds, is detonated in these holes. Apparently no damage results from the firing of these charges. "Since the rights-of-way for these highways are secured for road use, questions arise as follows:

"1. Does the State Highway Director have a right to issue a permit for such surveys to be made on and under rights-of-way of the State highway system?

"2. Should the Highway Director have a right to permit the surveys to be executed from the surface, would the grantee of such a permit have to secure a permit from the adjoining property owners to do such work below the surface?

"Your official opinion is requested in answer to the above questions."

In reply to your first question, it is my conclusion that, under his general power to prescribe reasonable rules and regulations governing the placement and operation of private businesses of any nature which obstruct or encroach upon public highways, the State Highway Director has authority to grant or deny permits to oil companies desiring to conduct oil exploration seismograph surveys and other geophysical tests or experiments upon and under the rights-of-way of Alabama highways. Oil companies desiring to conduct such surveys must first obtain the permission of the State Highway Director. See Quarterly Report of Attorney General, Vol. 68, page 49; Title 23, Section 16, Code of Alabama 1940.

The precise question involved does not appear to have been passed upon by the courts of this State. I can find no authority, however, which would prohibit the State, acting through its Highway Director, from granting to private companies permission to use the highway rights-of-way under certain conditions. This office has previously ruled that the State may lease the beds of its navigable streams for oil drilling purposes so long as the use is not inconsistent with the public interest and is subject to the right of the federal government to control navigation and commerce. Quarterly Report of Attorney General, Vol. 31, page 74.

The requested use here will, of course, be of very temporary duration. In other analogous situations this office has held that the Highway Department may grant its permission for the installation of a water main on the right-of-way of a public highway (Quarterly Report of Attorney General, Vol. 20, page 30); and that the owner of mineral rights in land granted for a highway right-of-way may remove such minerals, even without permission of the Highway Department, when the removal occurs before actual construction of the highway has begun (Quarterly Report of Attorney General, Vol. 22, page 92).

Whether or not such a permit may be issued, therefore, depends upon a factual determination by the Director that the conduct of the exploratory surveys or tests will or will not obstruct traffic, cause injury to the highway or right-of-way, or otherwise interfere with the right of the public to traverse the highways. The fact that holes are to be drilled along the rights-of-way and explosives detonated in these holes brings up the question of possible damage which the blasting might cause to the highway bed or pavement and to buildings or other structures adjacent to the site of the exploratory operations. It is suggested that any permit to conduct such operations be issued with contractual stipulations providing that the permittee will repair or compensate for any damage to State property, that he will leave the highway and the right-of-way in the same condition

after the tests as they were before, and that he will satisfy any claims made against the State by third parties on account of the testing operations. (Adjoining property owners might claim damages resulting from seismograph operations for one of several reasons; see 4 Summers, *Law of Oil and Gas*, Sec. 659 et seq.)

In case the surveys should involve the digging up of the road or highway, your attention is called to the provisions of Title 23, Section 28, Code of Alabama 1940, which require the permittee to furnish the State with a cash deposit or bond conditioned upon his replacing the road in as good a condition as it was before the work was done. And if there is any possibility that the exploratory operations might result in a more or less permanent obstruction on the highway such obstruction might be said to constitute a public nuisance. *Birmingham Railway, L. & P. Co. v. Smyer*, 181 Ala. 121, 61 So. 354. It is for this reason that leases granting drilling rights on public highways have been held void as permitting the performance of an illegal act, i.e., the obstruction of a highway, *Simpson v. Adkins*, 386 Ill. 64, 53 N. E. (2d) 979; *Boone v. Clarke*, Tex. Civ. App., 214 S. W. 607.

In reply to your second question, an oil company desiring to conduct geophysical surveys on land lying beneath the rights-of-way of public highways should also obtain the permission of the abutting landowners.

It is well settled that the owners of abutting land on each side of public highways own the minerals beneath the surface to the center of the road. 2 Elliott, *Roads and Streets*, Secs. 876, 876.0; 39 C. J. S., *Highways*, Section 138. When the State acquires land for a right-of-way the fee remains in the abutting landowners subject only to a burden or easement for highway purposes in favor of the public. Quarterly Report of Attorney General, Vol. 22, page 92. The governmental authority which administers this public easement may not, therefore, make any grant of mineral rights beneath public highways and rights-of-way since it has no such rights to grant. 2 Summers, *Law of Oil and Gas*, Sec. 221. Such minerals may be mined by their owners so long as their removal does not interfere with public use of the highway or disturb its surface. *Gamble v. Pettyjohn*, 116 Mo. 375, 22 S. W. 783; *Coyne v. John Gibbons Coal Co.*, 314 Pa. 502, 172 A. 653.

For the foregoing reasons it has been held that geophysical tests or experiments conducted upon public highways are in the nature of exploratory operations, the right to which belongs exclusively to the owners of the mineral interests. An unauthorized invasion, in the form of conducting such tests without the permission of such owners, renders the invader a trespasser and liable for damages resulting to the property right. *Ohio Oil Co. v. Sharp*, 135 F. (2d) 303 (10th Cir.), and cases cited.

Consequently, I would advise persons desiring to conduct seismograph surveys on highways rights-of-way also to obtain permission from the owners of mineral rights in the land beneath such rights-of-way. Even though similar permission has already been granted by the State Highway Department, this permission carries no warranty and could not divest the abutting owners of any rights they may possess. See Quarterly Report of Attorney General, Vol. 20, page 30.

Very truly yours,

SI GARRETT

Attorney General

March 23, 1953

Hon. W. J. Terry

State Superintendent of Education

Montgomery, Alabama

County Superintendents of Education—Henry County— Constitutional Amendments—County Boards of Education—Schools.

1. The salary now provided by law for the elected County Superintendent of Education of Henry County for term beginning July 1, 1953, can be increased by the Legislature before that date without violating constitutional amendment proposed by Act (Joint Resolution) No. 748, General and Local Acts 1951, page 1297, which became effective May 16, 1952, and the fact that the elected officer is also serving as appointee for an unexpired term would not affect his right to such increase.
2. The County Board of Education of Henry County cannot appoint an educational consultant for the unexpired term of the County Superintendent of Education and assign him all the duties of the Superintendent, except the approval of pay rolls.
3. The County Board of Education of Henry County has a reasonable time within which to fill a vacancy in office of County Superintendent of Education.
4. County Superintendents of Education do not have to have valid teachers' certificates during their term of office.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of March 9, 1953, is as follows:

"Your opinion is requested on the following questions:

"1. If the Board of Education of Henry County appoints a county superintendent to fill an unexpired term and such person is the man who has been elected for a regular four-year term, would such appointment jeopardize the possibility of such person's receiving a salary raise when he assumes office for his elective term, if by local act the Legislature increases the salary prior to the beginning date of such elective term, July 1?

"2. Can a county board of education appoint an educational consultant for the unexpired term of a county superintendent and assign him all of the duties of the superintendent except the approval of pay rolls?

"3. If question No. 2 is answered in the affirmative, can the board of education elect one of its own members to act as executive secretary to approve pay rolls and serve in that capacity for four months?

"4. If question No. 3 is answered in the negative, must the board of education appoint a county superintendent for the unexpired term within thirty days?

"5. Does a county superintendent have to have a valid teacher's certificate during his term of office?"

The County Superintendent of Education of Henry County is elected to office under the provisions of Act No. 254, Local Acts 1931, page 112. The county superintendent elected in the general election in November, 1952, takes office for a four-year term beginning July 1, 1953. Act No. 569, General Acts 1943, page 573. The salary of the office is authorized and required to be fixed by the Board of Education of Henry County at not less than \$2,000.00 nor more than \$3,000.00 per annum. Act No. 30, Local Acts 1945, page 39.

There is now a vacancy in the office of the county superintendent of education for the term ending midnight, June 30, 1953. It is a vacancy required to be filled under said Act No. 254, supra, by the County Board of Education of Henry County.

An appointee to fill an unexpired term takes the salary prescribed by law at the time of appointment. Quarterly Report of Attorney General, Volume 22, page 91; Quarterly Report of Attorney General, Volume 20, page 317. Here, there is a minimum and a maximum salary fixed by law. So the salary to be fixed for the appointee is, in my opinion, a matter of contract between the appointee Superintendent of Education and the County Board of Education of Henry County so long as the amount fixed ranges from \$2,000.00 to \$3,000.00 per annum. Quarterly Report of Attorney General, Volume 68, page 57; Quarterly Report of Attorney General, Volume 61, page 35.

The appointee holds office only for the unexpired term, and when his successor, who has already been elected, qualifies, the appointee's tenure is at an end. *McDonnell v. State*, 199 Ala. 240, 74 So. 349.

It might be that under the constitutional amendment proposed by Act (Joint Resolution) No. 748, General and Local Acts 1951, page 1297, which became effective May 16, 1952, the appointee's salary could not be raised during the unexpired term by the Legislature either before or after his appointment beyond the maximum of \$3,000.00. This constitutional amendment does not, however, in my opinion, prevent the Legislature from increasing the salary of the said County Superintendent for the term beginning July 1, 1953, provided the Legislature does so before that term begins. The said constitutional amendment, proposed by said Act No. 748, would prohibit the increase "during the term for which he is elected or appointed." But this proposed salary increase could occur by legislative act before and not during the term of office of the county superintendent, beginning July 1, 1953.

It is my opinion, therefore, since the unexpired term to be filled by the appointee is separate and distinct from the new term beginning July 1, 1953, the appointment to fill the unexpired term of the person who has been elected for the new term would not prohibit the possibility of such person receiving a salary raise when he assumes office for his elected term. It follows that your question No. 1 should be answered in the negative.

The law does not favor vacancies in office. *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429. Act No. 254, *supra*, expressly provides that in the event of a vacancy in the office of County Superintendent of Education of Henry County for any cause, except removal, such vacancy "shall be filled" by the county board of education of said county.

The county superintendent of education is the chief executive officer of the county and serves as secretary of the board. He is required to devote his entire time to public school business; he sees that the laws relating to the schools, under the rules and regulations of the state and county boards of education, are carried into effect; he has authority to ad-

minister oaths and examine witnesses relating to public schools; he recommends for approval and adoption by the county board the kind, grade, and location of schools to be established and maintained, and generally recommends the educational policies and promotes the educational interest of the county in which he is superintendent. In addition, he nominates for appointment by the Board, principals, teachers, and employees; and conducts conferences with principals, teachers, attendance officers, school trustees, and other interested citizens. These are just some of the enumerated duties of the county superintendent of education.

It is my opinion, therefore, that when a vacancy occurs, as distinguished from a leave of absence granted to a superintendent, the law contemplates that it be filled by the appointing power so that there will be, in reality, a superintendent of education available and acting in the performance of the numerous duties imposed upon him by law.

In *Bice v. Foshee*, 19 Ala. App. 421, 97 So. 764, Judge Samford expressed the view also that a county board of revenue did not have the power to contract with a person to perform acts which are part of the official duties imposed by law on other officers of the county or state. That reasoning is applicable here.

It is my opinion, therefore, that your question No. 2 should be answered in the negative.

Question No. 2, having been answered in the negative, it is not necessary to answer question No. 3.

Act No. 254, provides that a vacancy in the office of County Superintendent of Education for Henry County from any cause, except removal, shall be filled by the county board of education of the county. Under said act, the state superintendent of education has authority to fill a vacancy only in cases where the county superintendent is removed for cause.

Under Title 52, Section 110, Code of Alabama 1940, vacancies in the office of county superintendents elected or appointed under the general law are filled by the county boards of education within thirty days after such vacancies occur. If a vacancy is not filled within thirty days, the state superintendent of education fills it by appointment regardless of the cause of the vacancy.

I am of the opinion, therefore, that the local act governs the filling of a vacancy in the office of County Superintendent of Education for Henry County. It is to be noted, however, that said Local Act No. 254, *supra*, does not provide the time within which the vacancy must be filled. It is the general rule that when no time is specified within which an official act must be performed, it must be done within a reasonable time. 67 C. J. S., Officers, Section 114, pages 402, 406.

The Legislature has indicated that thirty days is a reasonable time within which to fill the vacancy by the provisions of the general law governing the same. This time limit, however, is not absolutely controlling on the County Board of Education of Henry County. Whether or not a longer time might be considered reasonable depends on the facts of the particular case. For instance, the difficulty the board of education might have in finding one for the position within the salary range now provided by law.

It is my opinion, therefore, that your fourth question should be answered in the negative.

The qualifications of county superintendents of education are set forth in Title 52, Section 103, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, page 300, and Act No. 20, General Acts 1947, page 6, which provides as follows:

"... No person shall be eligible for appointment by any county board of education, or for political party nomination, or for election to the office of county superintendent of education of any county who does not hold an Alabama certificate in administration and supervision based upon requirements established by the state board of education for such certificate, and who does not submit proof to the state superintendent of education of three years of successful educational experience as teacher, principal, supervisor, superintendent, education administrator, or instructor in school administration during the five years next preceding his appointment or election; provided, however, that time spent in the Armed Forces of the United States during World War II shall not be construed as breaking continuity of educational experience; provided, that a person so appointed by the county board of education need not be a resident or a qualified elector of the county in which he is to serve; and provided further, that the academic and professional qualifications prescribed herein shall not apply to county superintendents of education in office on September 6, 1927."

It appears, therefore, that a county superintendent of education is not required to have a valid teacher's certificate during his term of office, so your fifth question is answered in the negative.

Very truly yours,

SI GARRETT

Attorney General

March 23, 1953

Hon. H. E. Lindsey

Chairman

Marion County Board of Revenue

Hamilton, Alabama

Counties—Schools—County Boards of Education—Veterans.

Under the authority of Title 52, Section 388, Code of Alabama 1940, a county governing body may purchase, out of the General Fund, and donate to the Veterans Training School Program corrugated twelve-inch steel culvert pipes for the construction of cultipackers found necessary in that program.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of March 11, 1953, is as follows:

"The Veterans training school program needs about eight cultipackers to use in their program. As you probably know, these cultipackers are made by the G. I. Training boys from corrugated 12" steel culvert pipes. The Marion County Board of Revenue purchases this item from time to time. The Board is desirous of donating the necessary number of pieces of pipe to this Veteran Training Program so that the men themselves can construct the cultipackers with the pipe.

"Our question is can we buy this pipe and donate it to the Marion County Board of Education for such a purpose? We are under the impression that if you answer this question in the affirmative that such purchases will have to be made out of the general fund.

"Please let us know whether we are correct in this assumption. We would most appreciate an early answer as it is very important if we can help to do so without delay."

In my opinion, your question should be answered in the affirmative.

As was pointed out in an opinion of this office, reported in Quarterly Report of the Attorney General, Vol. 61, page 86:

". . . vocational training programs for veterans are conducted as part of the county and city school systems in the State of Alabama. These programs of training are conducted under the administrative

supervision of the State Department of Education. The State Department of Education pays for the cost of administering such vocational training programs out of the funds provided by the United States and the State of Alabama, pursuant to the Smith-Hughes Act (28 U. S. C. 11-29, as amended) and Title 52, Sections 381-389, Code of Alabama 1940, as amended."

Title 52, Section 388, Code of Alabama 1940, provides as follows:

"Boards of revenue and courts of county commissioners of counties of Alabama are hereby authorized to make appropriations to county boards of education to be used in providing classrooms, laboratories, and shops for use in teaching vocational subjects, and for maintaining such vocational departments after they have been established; provided that such appropriations may only be made for use in any school or schools duly recognized by the state board of education as centers for vocational instruction of the Smith-Hughes type, and on account of which reimbursement is being made or is to be made during the next fiscal school year following the first payment of County funds appropriated for such purposes." (Emphasis supplied.)

Courts of County Commissioners are authorized to appropriate money for such vocational schools as are described by Section 388, *supra*. Biennial Report of the Attorney General, 1930-1932, page 946.

It has also been held that the Court of County Commissioners of Pickens County could make an appropriation from its general fund for the purpose of supplementing the salaries of the teachers of Vocational Agriculture in the high schools of the county. Quarterly Report of the Attorney General, Vol. 32, page 14.

Furthermore, county governing bodies are authorized to make such appropriations of county funds as are reasonably necessary to provide "canning plants" or buildings and equipment necessary for instruction, training, and education in the art of canning, in connection with appropriations by the federal government for vocational education. Quarterly Report of Attorney General, Vol. 39, page 8.

Therefore, it is my opinion that the county governing body of Marion County has the authority to purchase the corrugated twelve-inch steel culvert pipes, and to donate them to the county board of education, for use in the Veterans Training Program and for the construction of such cultipackers as necessary in that program, such purchase to be made out of the General Fund of the county.

Very truly yours,

SI GARRETT

Attorney General

March 23, 1953

Hon. Frank Grigg

Clerk, Circuit Court

Jackson County

Scottsboro, Alabama

Jackson County—Costs and Fees—Clerks of Circuit Courts—
Inferior Courts—Opinions Overruled, Modified or Distinguished.

1. The Clerk of the Jackson County Court is entitled to a fee of fifty cents for issuing a warrant of arrest.
2. Quarterly Report of Attorney General, Vol. 24, page 17, overruled in part.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 18, 1953, is as follows:

"I am Ex Officio Clerk of the Jackson County Court which was created by Local Acts 1939, page 368, Senate Bill No. 379. Section 22 of this act provides as follows:

"'Prosecutions for misdemeanors committed in Jackson County may be instituted in this court by making an affidavit before the judge of said court or the clerk thereof, the writ of said affidavit to be issued by the clerk of said court, and when the defendant is arrested on said affidavit, said case shall go on the docket for trial, and be tried as though the defendant had been indicted by a grand jury, provided, that the affidavit or complaint may be amended as now provided by amendment of such papers by Section 3825 of the Code of Alabama.' "Title 11, Paragraph 89 as last amended by 1947 Acts of Alabama, page 266, which appears in the Supplement to the Code of Alabama as Section 89, provides that 'for issuing any writ, scire facias, or notice, the clerk shall receive fifty cents.' I have been issuing writs of arrest as provided in Section 22, Code of Alabama, and have been charging as a part of the costs in the case \$.50 for issuing the writ. When there is a nol prosee or when the defendant is acquitted, I charge the clerk and sheriff's costs to the fine and forfeiture fund and charge this \$.50 to that fund as my cost for issuing the writ of arrest. If the defendant is convicted, it is charged to him as a part of the costs of the case.

"I have recently been examined by Mr. Dermott and he has raised the question that I am not entitled to charge this fee of \$.50 for issuing the writ of arrest and he bases his opinion on an opinion of the Attorney General of the State of Alabama rendered by the Honorable Thomas S. Lawson on July 3, 1941, which appears in the Quarterly Report of the Attorney General of Albaama, for the period from July 1, 1941, through September 30, 1941, at page 17 in which the Attorney General stated that it was his opinion that the Clerk of the Circuit Court of Jackson County as Ex Officio Clerk of the Jackson County Court was not entitled to charge a fee for issuing a writ.

"It is my contention that since this act provides that I am to receive the same fees in the Jackson County Court that a Clerk is entitled to received in the Circuit Court that I am entitled to charge \$.50 for issuing this writ of arrest under the provisions of Section 89 of Title 11, of the Code of Alabama as last amended.

"I would like for you to render an opinion on this matter and if it is favorable to me, I would appreciate it if you would furnish Mr. McDermott or his department with a copy of the same."

I am of the opinion that the opinion of the Attorney General, rendered under date of July 3, 1941, and appearing in Quarterly Report of Attorney General, Vol. 24, page 17, is partially in error and should be overruled.

It is further my opinion that the Clerk of the Jackson County Court is entitled to a fee of fifty cents for issuing a writ of arrest.

The opinion of the Attorney General referred to above holds that the Clerk of the Jackson County Court is not entitled to a fee when he takes an affidavit and issues a warrant of arrest. This holding was based upon the theory that there was no provision of law which provides a fee for the issuance of warrants of arrest.

It is clear to me that this opinion is wrong in respect to its holding concerning the clerk's fees for issuing a warrant of arrest and to this extent is hereby overruled.

The Jackson County Court was created by Act No. 647, Local Acts 1939, page 368. This act provides that the Circuit Clerk of Jackson County shall be the ex officio Clerk of the Jackson County Court. Section 22 of Act No. 647, supra, provides that prosecutions for misdemeanors may be instituted in the Jackson County Court by making affidavit before the judge or the clerk of the court. This section further provides that "the writ of said affidavit to be issued by the clerk of said court, and when the defendant is arrested on said affidavit, said case shall go on the docket for trial." In my opinion, "the writ or said affidavit," referred to means a writ of arrest issued upon an affidavit made before the judge or the clerk.

It plainly appears, therefore, that the Clerk of the Jackson County Court is authorized not only to take an affidavit in a misdemeanor case, but he may also issue a warrant of arrest.

The fees of the clerk are provided for in Section 4 of Act No. 647, as amended by Act No. 75, General and Local Acts 1949, page 102. Section 4 as amended, *supra*, states that the Clerk of the Jackson County Court "shall be entitled to the same fees, commissions and compensations as are now, or may hereafter be allowed to Circuit Clerks of Alabama, and such fees, commissions and compensations shall be collected as they are collected in the Circuit Court of Jackson County." The general schedule of fees for clerks in criminal cases is provided for in Title 11, Section 89, Code of Alabama 1940, as amended by Act No. 375, General Acts 1947, page 264. This section, as amended, allows the circuit clerk a fee of fifty cents "for issue of any writ, scire facias, or notice." Without argument, a writ of arrest is a writ. It serves the same purpose as a *capias* regularly issued by clerks of circuit courts upon indictments.

I am, therefore, of the opinion that, since the Clerk of the Jackson County Court is entitled to circuit clerk fees, he is entitled to a fee of fifty cents for issuing a writ of arrest. Title 11, Section 89, Code of Alabama 1940, as amended, *supra*, supplies the authority for paying said fee, contrary to the holding in the opinion of the Attorney General appearing in Quarterly Report of Attorney General, Vol. 24, page 17, which is hereby overruled insofar as said opinion is in conflict with this opinion.

Yours very truly,

SI GARRETT

Attorney General

March 27, 1953

Hon. Frank M. Stewart

Commissioner of Agriculture

Department of Agriculture and Industries

C A P I T O L

Department of Agriculture and Industries.

1. The sale of ice cream containing fats other than milk fat is prohibited by State law.

2. A frozen food product resembling ice cream, but containing fats other than milk fat and no milk fat, may not be sold in Alabama even if the product is properly labeled and not sold as "ice cream."

3. Frozen food products containing milk, cream, or skimmed milk, to which fats or oils, other than milk fat, have been added, may not be sold in Alabama even if this product is properly labeled and not sold as "ice cream."

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of January 12, 1953, is as follows:

"Your attention is directed to the provisions of our State law which controls the sale of dairy products (Title 2, Sections 186-207, Code of Alabama 1940) and the provisions of the State law governing the sale of food and food products (Title 2, Sections 303-315, Code of Alabama 1940).

"We have had a number of inquiries as to whether a frozen product resembling ice cream can be sold in the State of Alabama. The product to which I refer contains vegetable oil and since a provision in our dairy products law (Section 189) appears to prohibit the sale of milk in various forms to which fat or oil, other than milk fat have been added, it will be appreciated if you will give me your opinion on the following questions:

"1. Is the sale of ice cream containing fats other than milk fat prohibited by our State law?

"2. Can a frozen food product resembling ice cream, which product contains fats other than milk fat, be sold in Alabama, provided such product is properly labeled and is not sold as 'ice cream'?

"3. Can a frozen food product containing milk, cream or skimmed milk to which fat or oil, other than milk fat, has been added, be sold in Alabama, provided such product is properly labeled and is not sold as 'ice cream'?

"4. Does the State Board of Agriculture and Industries have authority to adopt standards of purity for the sale of a frozen food product to which vegetable fat and other fats, other than milk fat have been added?

"5. Does the State Board of Agriculture and Industries have authority to promulgate regulations prescribing the size of a package in which frozen food products may be sold and other regulations designed to protect the consuming public from misrepresentation in the sale of this product?"

The answer to your Question 1 is quite clearly found in the relevant statutes. Ice cream, if its ingredients conform to the definition set out in Title 2, Section 196, Code of Alabama 1940, contains cream, or milk, or milk and milk fat. The addition of "any fat or oil other than milk fat" (except any oil or fat contained in eggs, nuts or flavor) adulterates ice cream under Title 2, Section 197, Code of Alabama 1940. Of course, adulterated ice cream may not be sold. See Title 2, Sections 303 and 304, Code of Alabama 1940; cf. Title 2, Section 188, Code of Alabama 1940.

So far as your Question 3 is concerned, Section 197 again prohibits the sale of a frozen food product containing a mixture of milk, cream or skimmed milk, and fat or oils other than milk fat. Whatever the product may be called, it appears to conform to the statutory definition of ice cream set out in Section 196, *supra*. See *Carolene Products Co. v. United States*, 323 U. S. 18. (The *Carolene* case will be discussed in detail below.) If any further statutory proscription is necessary, Title 2, Section 189, Code of Alabama 1940, supplies it. This section provides that no person "shall for the purpose of sale or exchange, add any fat or oil other than milk fat to, or blend or compound the same with, any milk, cream, or skimmed milk."

Before reaching Question 2, which is the really difficult question involved, brief discussion of legislative purpose may be helpful. This is especially so since your questions indicate an idea that labeling may avoid the pitfalls of the statute.

The Alabama statutes involved are fairly typical "Filled Milk" statutes. The basic legislative intent exhibited by such laws is that milk or milk products—and for our purposes ice cream may be considered a milk product—shall not contain milk or milk fat in compound with vegetable fat or some other kind of oil or fat. In *Carolene Products Co. v. United States*, *supra*, the Supreme Court wrote to the single question—assuming that articles of food consist in part of milk fat, and some other fat, in compound, and assuming that the product is nutritionally sufficient and not imitative of milk or milk products and not sold as milk or milk products, may these articles of food nevertheless be banned from interstate commerce by Congress without violating the Fifth Amendment of the United States Constitution? The Supreme Court held that Congress had acted within its constitutional power. (That court reached a similar result as to state legislation in *Sage Stores Co. v. Kansas*, 323 U. S. 32.) The court's observations are illuminating. For the court considered the following facts relevant:

That the contents of the can in which the product was sold were "practically indistinguishable by the buying public from evaporated whole milk, but the cans are truthfully labeled to show the trade names and the ingredients" (p. 21); that, so far as the record showed, the filled milk compounds as enriched were just as wholesome and nutritious as milk, and contained the same content of calories and vitamins.

However, the court held that Congress could legitimately and reasonably find that this milk compound, or filled milk product, should be banned from interstate commerce. The court considered factors which, according to Congressional reports, motivated the legislation. The cans were the same size; retail dealers advertised the product as milk and evaporated milk. Storekeepers sold it with statements that the product "takes the place of milk," or "is just as good as condensed milk and much cheaper," or "that there is nothing better on the market," etc. The compound had been used in certain instances for making ice cream. Many retailers sold the compound for the same price as regular evaporated milk, though the price given to the retailers was less. The products were sold oftentimes in areas where many people were unable to read English.

The court also considered the contention that the products were not sold in imitation or semblance of milk. The court concluded that Congress had banned, and could legitimately prohibit, the sale of the product since the confusion arose not from any conscious effort to deceive, but from the nature of the ingredients. And the court commented that the addition of vitamins would not affect the physical likeness of the filled milk product to the whole milk product.

Finally, the court held that it was perfectly proper for Congress to ban filled milk products even though the products were not impure or unwholesome, where a Congressional reason had obviously been avoidance of confusion.

"... In dealing with the evils of filled milk, Congress reached the conclusion that labeling was not an adequate remedy for deception. On the point of the constitutionality in relation to due process of the prohibition of trade in articles which are not in themselves dangerous, but which make other evils more difficult to control, such as confusion in the filled milk legislation, the Powell Case is authority for the validity of congressional action in the Filled Milk Act." (Pp. 29 and 30, Carolene case, supra.)

And further:

"... Here a milk product, skimmed milk, from which a valuable element—butterfat—has been removed is artificially enriched with cheaper fats and vitamins so that it is undistinguishable in the eyes of the average purchaser from whole milk products. The result is that the

compound is confused with and passed off as the whole milk product in spite of proper labeling." (P. 31)

While our problem is not a constitutional one, the analysis of the *Carolene* case illuminates the legislative intent. Principally, it showed that for some reason, where combinations of milk fat and non-milk fat were easily confused with whole milk fat products, legislatures outlawing this combination were concerned with eliminating this confusion. This is so even though it may be shown that the compound product was neither impure nor unwholesome. Alabama statutes, cited above, as applicable to ice cream and other milk products, exhibit a similar legislative purpose.

The key issue in your second request is whether or not the legislative proscription may be avoided by a product which may be just as indistinguishable from ice cream made from whole milk, as ice cream made from compounding milk fat and non-milk fat products, but which, this time, has no milk fat at all. For it is a safe conclusion that the Legislature did not conceive the only evil to be the mere combination of the two elements—milk fat and non-milk fat. In this connection, see *State v. McCosh*, Neb., 279 N.W. 775, 777:

"In view of the public policy evidenced by the terms of the statute, immunity cannot be established by substitution of a milk trade name for a product which its constituent elements fairly identify as one embraced within the terms of the regulating statute."

Clearly, one of the principal ingredients set out in Section 196, *supra*, cream or milk, is missing from this frozen food product. But since Section 196, *supra*, uses the word "chiefly" before setting out the various ingredients included in the statutory definition of "ice cream," the mere absence of milk fat from the instant product may not be enough to put it outside statutory definitions of ice cream, and hence, outside the non-milk fat ban.

The earlier discussion in this opinion indicates that the legislation in question does not turn merely on questions of wholesomeness or questions of proper labeling. The element of confusion was important in the legislative thinking. If such frozen food product resembles ice cream, and may be confused with ice cream, then it may be included in the Section 196 definition, and the same adulteration factors—namely, those factors set out in Section 197, *supra*—apply. Cf. *Thayer v. Michigan Dept. of Agriculture*, 323 Mich. 403, 35 N. W. 2d 360. For it seems that the use of the word "chiefly" in Section 196, *supra*, indicates that the Legislature did not intend to exclude a product containing no milk fat. An earlier case shows that ice cream without milk or cream was not beyond the common connotation of ice cream. In *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 158, Mr. Justice Brandeis, for the Supreme Court, commented:

"According to some formulas vanilla ice cream may be made without any cream or milk whatsoever; for instance, by proper manipulation of the yokes of eggs, the whites of eggs, sugar, syrup and the vanilla bean. All of these different compounds are commonly sold as ice cream and none of them are necessarily unwholesome."

See also, *Jewel Tea Co. v. Kraus*, 187 F. 2d 278 (7th Cir. 1951), which states that under some formulas ice cream is made without the use of cream or milk.

I conclude, therefore, that totally non-milk fat ice cream was within the purview of Section 196, *supra*, because the element of confusion between whole milk ice cream and filled ice cream was an important motivation of the Legislature; because the element of confusion is not removed in a totally non-milk fat product; and because proper labeling and wholesomeness, as pointed out in the *Carolene* case, *supra*, do not satisfy the legislative purpose. Since the product described in Question 2 is held to be within Section 196, *supra*, it is adulterated ice cream within the meaning of Section 197, *supra*, and, therefore, outlawed.

I do not foreclose the possibility that the product described in Question 2 might be prohibited by Section 189, *supra*, or by some of the misbranding and imitation sections found in Title 2, Sections 303-314, Code of Alabama 1940. But the conclusion that this product fits Section 196, *supra*, makes further writing on these latter sections unnecessary.

So far as the authority to promulgate departmental regulations is concerned, there is broad authority to establish regulations reasonable and necessary "to accomplish the evidence purpose and intent of the law." (Title 2, Section 4, Code of Alabama 1940.) See also, Title 2, Section 186, Code of Alabama 1940. But since the answers to your first three questions are negative, it appears unlikely that such regulations will be forthcoming.

Yours very truly,

SI GARRETT

Attorney General

March 31, 1953

Hon. James F. Hester

Judge of Probate

Franklin County

Russellville, Alabama

Judges of Probate—Franklin County—Funds—Highways and
Highway Department—Rights of Way—Roads and Bridges.

The recording fees for right of way deeds for public roads in
Franklin County should be paid from the road and bridge funds
held in trust by the State of Alabama for Franklin County.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your predecessor's request for an official opinion, bearing date of January 24, 1952, is as follows:

"Right-of-way deeds for public roads in Franklin County are being presented to the office of the Probate Judge for record by Franklin County, or the governing body of Franklin County who procures them.

"I have filed claim against the county for some right-of-way deeds that have recently been recorded in the office of the Probate Judge and there will be more to be filed. Please advise me from what fund the recording fees for said deeds can be paid to me as Probate Judge for the service of the recording of said deeds.

"The budget of the General Fund does not show a surplus to be transferred to the Road Fund of the county. The Road & Bridge Fund, according to the Todd Act 143, General Acts 1951, Page 378, would require all monies to be used for roads to be transferred to the State Highway Department."

The answer to your inquiry has been delayed pending the decision of the Supreme Court of Alabama as to the validity of Act No. 143, General and Local Acts 1951, page 378. This act was recently held constitutional. *Archie B. Hall et als. v. Edgar Underwood et als.*, 8th Div. 644, Sup. Ct. Ms. February 26, 1953.

Section 7 of Act No. 143, *supra*, provides in part as follows:

"The State Highway Department shall construct, maintain and repair the county roads and bridges of Franklin County from the funds pa-

over to it pursuant to Section 4 of this Act, and from funds which would otherwise accrue to Franklin County for road and bridge work from any source whatsoever. . . ."

Normally, a county may pay for the acquisition of a right of way from gasoline funds. Quarterly Report of Attorney General, Vol. 23, page 263. The cost of the acquisition of a right of way includes recording fees. Quarterly Report of Attorney General, Vol. 35, page 79.

However, since all road and bridge funds of Franklin County are now administered by the State Highway Department, *Hall v. Underwood*, supra, it is my opinion that the recording fees for right of way deeds for public roads in Franklin County should be paid from the road and bridge funds held in trust by the State of Alabama for Franklin County.

Yours very truly,

SI GARRETT

Attorney General

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